Supreme Court, U. S.
FILED
NOV 18 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1529

ROBERT J. HENDERSON, Superintendent of
Auburn Correctional Facility,

Petitioner,

against

TIMOTHY G. MORGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 6, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

INDEX

PAGE

Docket Entries 1a

Petition for a Writ of Habeas Corpus 8a

Memorandum-Decision Order of United States District Court, Northern District of New York, Denying Petition for a Writ of Habeas Corpus and Granting Leave to Proceed in Forma Pauperis, September 26, 1973 ..... 25a

Decision of United States Court of Appeals for the Second Circuit Granting a Certificate of Probable Cause, Reversing Dismissal of Petition and Remanding Case to District Court for an Evidentiary Hearing, dated December 12, 1973 .... 29a

Minutes of Evidentiary Hearing in the United States District Court for the Northern District of New York, Held May 3, 1974, Auburn, New York ... 30a

WITNESSES

Timothy Morgan

Direct 32a
Cross 38a
Redirect 42a

H. Andrew Schlusberg

Direct 43a

Floyd J. Rinehart

Direct 49a
Cross 57a
Redirect 59a
Recross 62a

PAGE

Robert P. Best
Direct 63a
Cross 66a
Doris A. Morgan
Direct 71a
Cross 72a

EXHIBITS

1965 Sentence and Plea Minutes, Fulton County Supreme Court, marked for identification and received in evidence 31a

Minutes of Arraignment in Supreme Court, Fulton County, April 15, 1965 ..... 83a

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965 ..... 90a

Minutes of Sentencing in Supreme Court, Fulton County, June 15, 1965 ..... 97a

Decision of Supreme Court, Fulton County, denying Petition for Writ of Error Coram Nobis, dated May 29, 1971 ..... 110a

Opinion and Order of the United States District Court for the Northern District of New York Granting Petition for Writ of Habeas Corpus, dated October 29, 1974 ..... 113a

Notice of Appeal, dated November 6, 1974 ..... 119a

Order-Decision of the United States Court of Appeals for the Second Circuit, dated May 12, 1975 ..... 120a

Decision of the United States Court of Appeals for the Second Circuit, dated May 29, 1975, Recalling and Staying Mandate Pending Petition for a Writ of Certiorari 121a

Docket Entries.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

UNITED STATES OF AMERICA ex rel. TIMOTHY G. MORGAN,
Relator,

—vs—

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,
Respondent.

For plaintiff:

Joseph E. Lynch
Metcalf Plaza
Auburn, NY 13021

For defendant:

Joseph Castellani, Asst. Atty. General
State of New York
Albany, New York

Date		Proceedings
1973		
Oct.	3	(1) Filed Petition for Writ of Habeas Corpus
"	3	(2) Filed M
"	3	(3) Filed copy of Appellant's Brief—State of New York Court
"	3	(4) Filed copy of Respondent's Brief—State of New York Court

Docket Entries.

Date	Proceedings
" 3	(5) Filed copy of Notice of Motion and Affidavit—State of NY Court of Appeals
" 3	(6) Filed Decision of Supreme Court, State of NY, Appellate Division
" 3	(7) Filed photocopy of State of NY, Court of Appeals decision denying certificate to CPL 460.20
" 3	(8) Filed copy of transcript of proceedings Jan. 10, 1972—Appellate Div. Supreme Court, State of New York
" 3	(9) Filed Memorandum—Decision and Order (9/26/73) denying and dismissing Petition leave to proceed in forma pauperis is granted, and Clerk is directed to file papers without payment of fees—HON. E. PORT, USDJ
" 3	(10) Filed Judgment
Oct. 17	(11) Filed Application and Order denying application for Certificate of Probable Cause and order Denying same. Also allowing the filing of the Notice of Appeal contained within the application. Notice of Appeal so filed. (Certified copy forwarded to Clerk, C. C. A. and conformed copy to Atty General, State of N. Y. of Notice of Appeal).
Nov. 5	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
" 8	(12) Filed receipt of CCA for original papers forwarded
Dec. 19	All papers returned from CCA
" 27	(13) Filed certified copy of judgment of CCA granting certificate of probable cause. Dismissal of petition is reversed and case remanded for evidentiary hearing

Docket Entries.

Date	Proceedings
1974	
Jan. 10	(14) Filed Order on Mandate—issued summons —original—3 copies & del'vd one to Mars one to Atty and one to Atty General, State of NY
" 10	(15) Filed CJA Form 20—Copy 5
" 16	(16) Filed summons served 1/14/74 on Robert J. Henderson through Laura Velardi, Act.
Mar. 1	(17) Filed affidavit of Joseph R. Castelani in opposition to petition for Certificate of Probable Cause
" 7	(18) Filed Order (3/6/74) substituting Joseph E. Lynch in place of Richard N. Coser as Attorney HON. E. PORT, USDJ
May 2	(19) Filed Order for Writ of Habeas Corpus Ad Testificandum
" 2	WRIT ISSUED
" 6	Hearing. Witness for petition, witness for respondent. —All parties to submit briefs within 10 days. Petition remanded to custody of Marshal for return to State Custody
" 7	(20) Filed Marshal's return re execution of Writ
Oct. 31	(21) Filed Memorandum—Decision and Order (10/29/74) setting aside challenge conviction (Port)
" 31	(22) Filed judgment
" 31	Mailed cards to Joseph E. Lynch and Joseph Castellani, Asst. Atty Gen. State
Nov. 12	(23) Filed Notice of Appeal

Docket Entries.

Date	Proceedings
" 25	(24) Filed Notice of Motion returnable Dec. 9, 1974 at Syracuse, affidavit support of motion that relator respondent be admitted to bail pending determination of appeal
" 25	(25) Filed certificate of service
Dec. 9	Motion to grant bail pending appeal. Denied. Submit Order
" 12	(26) Filed Order (12/10/74) denying motion for order granting bail pending appeal—endorsed on cover of Notice of Motion filed Nov. 25, 1974—Hon.
Dec. 30	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
1975	
Jan. 13	(27) Filed Receipt of CCA for original papers forwarded
" 13	(28) Filed transcript of proceedings held May 3, 1974 at Auburn before Judge
May 19	(29) Filed Decision of C.C.A. affirming the order of this court with costs to be taxed against the appellant
June 2	(30) Filed Certified copy of decision of Circuit Court to recall the mandate and stay its reissuance for 30 days pending petition for a writ of certiorari to the Supreme Court of the United States
Aug. 4	Received all papers from C.C.A.
Aug. 12	(31) Filed Copy 2 of C.J.A. 20
Aug. 12	(32) Filed Copy 5 of C.J.A. 20

Docket Entries.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal From: Northern District
Case No.: 75 2017

Title of Case:

UNITED STATES OF AMERICA, ex rel. TIMOTHY G. MORGAN,
Relator-Appellee,

v.

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,
Respondent-Appellant.

TRANSFERRED FROM 74-8370
Cal. No. 932

Attorneys for Appellee:

Joseph E. Lynch, Esq.
Noble, Leary, Leary & Lynch
207 Metcalf Plaza
144 Genesee Street
Auburn, N.Y. 13021
(315-253-6201)

Attorney for Appellant:

Attorney General
State of New York
2 World Trade Center
New York, N.Y. 10047

NO. BELOW: 73-CV-440
JUDGE BELOW: E. Port
DATE OF ORDER: 10-29-74
NOTICE OF APPEAL FILED: 11-6-74 11-12-74

Docket Entries.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No.: 75 2017

U.S. ex rel. Timothy Morgan v. Henderson, etc.

DATE	FILINGS—PROCEEDINGS
11-15-74	Filed motion to be relieved as counsel and for assignment of counsel with proof of service
11-21-74	Filed order denying leave to be relieved as counsel for assignment of counsel
12- 2-74	Filed certified copy of notice of appeal
12-31-74	Received record (original papers of district court)
1-28-75	Filed motion for leave to docket the appeal and to file the record with proof of service
1-29-75	Filed affidavit in opposition to motion for leave to docket the appeal etc. with proof of service
1-31-75	Filed order granting motion for leave to file and docket the appeal
2- 3-75	Received docket fee
2- 3-75	Filed record (original papers of district court)
3- 3-75	Filed motion to be continued as counsel for appellee under CJA w/pfs
3- 6-75	Filed order granting motion to be continued as counsel for appellee under CJA
3-14-75	Filed brief, appellee w/pfs
3-14-75	Filed appendix, appellant w/pfs
4- 1-75	Filed brief, appellee w/pfs

Docket Entries.

DATE	FILINGS—PROCEEDINGS
5- 7-75	Filed CJA-20 appointing Joseph E. Lynch as counsel for appellee Copies to A.O. and counsel
5-12-75	Argument heard (by: Kaufman, Feinberg, Jameson)
5-12-75	Affirming in Open Court
5-12-75	Filed judgment
5-12-75	Issued mandate (judgment)
5-20-75	Filed motion to recall mandate w/pfs
5-27-75	Filed affidavit in opposition to motion to recall mandate w/pfs
5-29-75	Filed order granting motion to recall mandate, etc.
5-30-75	Issued certified copy of order recalling mandate, etc.
6- 3-75	Filed recalled mandate
6- 9-75	Filed copy of notice by Supreme Court of filing petition for writ of certiorari (#SC 74-1529)
6-12-75	Filed notice by Supreme Court of filing petition for writ of certiorari (#SC74-1529)
7-29-75	Original record returned to District Court
8- 5-75	Filed receipt of return of original record to District Court
8-20-75	Filed CJA-20 of approved voucher No. 395767 for $437.97 Copy mailed to A.O.
10-15-75	Filed certified copy of order by Supreme Court granting petition for writ of certiorari (SC# 74-1529)

Petition for Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PETITION FOR WRIT OF HABEAS CORPUS, TITLE 28 U.S.C.A. SECTIONS 2241, ET SEQ.

TIMOTHY G. MORGAN, Relator in the foregoing Petition for Writ of Habeas Corpus, being sworn under oath, deposes and says:

1) That jurisdiction is invoked under U.S.C. Title 28 Section(s) 2241 et seq. in that

(a) He is in custody in violation of the Constitution, being confined and held by respondent under color of a judgment of conviction and sentence entered in the Supreme Court—Fulton County at the Courthouse in Johnstown, New York, on the 15th day of June 1965, following a plea of guilty in Murder in the second degree, entered on the 8th day of June, 1965, on an indictment alleging Murder in the first degree (no indictment No.), said indictment filed by the Fulton County Grand Jury on the 13th day of April, 1965. Hon. Harold R. Soden, Supreme Court Justice, presided at both pleading and sentencing. Sentence being imposed thereon of day less than twenty-five (25) years nor more than his Natural Life. He is presently imprisoned at the Auburn Correctional Facility on said sentence. No appeal was taken, the said proceedings and judgment being had on denial of due process of law under the Fourteenth Amendment; and;

Petition for Writ of Habeas Corpus.

(b) The issues presented in the instant petition were first raised in a pro se petition for writ of error coram nobis to the Supreme Court Fulton County, filed the 7th day of August, 1970, said petition alleged that the Trial Court made no attempt to ascertain if there was any factual basis for the plea of guilty that was being entered, in that, the court made no attempt either before or after accepting the plea of guilty to second degree murder to determine if the one essential element for that crime, that is, "a design to effect the death of the person killed" (See: Section 1046 Old N.Y.S. Penal Law), was present in the instant case (See: *People* v. *Serrano,* 15 N Y 2d 304, 258 N Y S 2d 386, 206 N.E. 2d 330; *People* v. *Seaton,* 19 N Y 2d 424).

Said petition further alleged that the plea was invalid and involuntary in that, it was not made with an understanding of the nature of the charges or the consequences of the plea (See: *Marvel* v. *U.S.,* 380 U.S. 262; *Monroe* v. *U.S.,* 5th Circ. 463 F 2d 1032; *U.S. ex rel. Hill* v. *United States,* 5th Circ. 425 F 2d 664; *Wells* v. *U.S.,* 5th Circ. 452 F 2d 1001; *Berry* v. *U.S.,* 3rd Circ. 412 F 2d 189; *Durant* v. *U.S.,* 181 Circ. 410 F 2d 689).

Relator's petition was denied without a hearing by the Hon. Arthur C. Aulisi, Supreme Court Justice, Fulton County, on June 3rd, 1971. Relator filed timely Notice of Appeal to the Appellate Division, Third Department said court affirmed the lower court without opinion (*People* v. *Morgan,* 38 A.D. 1012) permission for leave to appeal to the Court of Appeals was denied without opinion on July 6th, 1972, petition to the United States Supreme Court was omitted under the rules in *Fay* v. *Noia,* 372 U.S. 391.

Relator has had no other action before the courts.

(21) That the violation of his constitutional rights persist, in that, due to the special mental defects of your re-

lator (I.Q. 68 to 75; mental age, 8 years old; classification, moron) which was known and acknowledged by the trial court, the court's failure to ascertain whether or not there was any factual basis for the plea of guilty to second degree murder, coupled with the fact that no one, neither court, counsel nor prosecutor even attempted to explain to him just what constituted the charge to which he was pleading guilty, effectively prevented him from having any understanding, much less, a full understanding of the nature of the charge to which the plea was entered.

This severely prejudiced him, for if the court had instituted an inquiry into the facts of the crime and attempted to establish the essential element of intent, it would have become apparent that said element was missing and the plea should not and could not have been accepted. Relator contends that this violated the due process and equal protection of law clauses of the Fourteenth Amendment of the Constitution of the United States.

Secondly, relator did not know and no one informed him of the consequences of pleading guilty to second degree murder. The only thing he was told, was that he would have to go to prison. He was informed of neither the minimum nor the maximum sentences that could be imposed, and without this vital information, relator contends, he could not enter an intelligent, knowledgeable plea.

Relator further contends that for a plea of guilty to be valid and voluntary it must be entered knowingly and intelligently with an understanding of the charges and the consequences of entering the plea, that this was not done in the instant case, thus violating the due process and equal protection of law clauses of the Fourteenth Amendment of the Constitution of the United States.

(3) That the Writ of Habeas Corpus should issue, a full evidentiary hearing should be held to inquire into the

allegations herein raised (*Townsend* v. *Sain,* 372 U.S. 293; *Fay* v. *Noia,* 372 U.S. 391), the Writ should be sustained and the relator ordered released from custody, in the law and the facts instant.

Law And The Facts

Since no opinions were handed down by either the State Appellate Division or the New York Court of Appeals both instances affirming the court below, it will be assumed that this was due to the opinion and decision of State Supreme Court Justice Aulisi's, denying relator's petitions for writ of error coram nobis, in which he states (See: Record on Appeal, page 17-A)

> "After a thorough reading of the record of the proceedings had on both the date of defendant's pleading and sentencing, it is clear to this Court that Justice Soden was extremely careful and cautious in ascertaining whether the defendant was fully aware of the change against him and his plea thereto, as well as the consequences of such plea. Justice Soden explicitly told defendant that he wanted to be sure that he, the defendant, knew what was happening, and the Court's questions were aimed at determining just that."

Your relator believes that Judge Aulisi's decision is based upon a statement made by Judge Soden when he was taking the guilty plea from relator (See: Record on Appeal pleading minutes, page 21).

> The Court: "You have to speak up so this man can take it down. I realize that, unfortunately, you have a low intelligence quotient and I want to make sure, as a court, that you understand the charge and

what is happening here, and that you understand it, not your Attorneys."

Justice Soden's expression of his desire that relator understand the charge, is a noble sentiment that does him honor, unfortunately, other than making the aforesaid statement, Justice Soden did nothing further to make clear to relator what the charge he, relator was pleading guilty to, was comprised of. There was no attempt by Justice Soden to ascertain if there was a factual basis for the plea; there was no attempt to explain what murder in the second degree was; and, finally, there was no attempt to discover if relator himself understood what he was pleading guilty to. The pleading minutes fully substantiate the above. Relator urges this Court, that under the circumstances, Justice Soden's expression of his desire that relator understand the charge, was less than adequate.

Relator, at the time he entered the guilty plea, was a youth, just turned 19 years of age, with an I.Q. that hovered between 68 and 75. He had been classified by the Rome School, Rome, N.Y. (a state school for mental defectives) as a moron with the mental age of an 8 to 9 year old child (See: Report of Rome School, attached to Appellant's Brief to Appellate Division, pages 12 thru 27). He was originally charged with the first degree murder of one Ada Francisco, committed on April 7th, 1965. On April 13th the Grand Jury of Fulton County indicted him on the above, and on April 15th, 1965, he was arraigned on the aforesaid indictment in the Supreme Court—Fulton County at the Courthouse in Johnstown, New York, before the Hon. Harold R. Soden (Justice Soden presided throughout arraignment, plea and sentence) the court assigned Mr. Floyd Reinhart and Mr. Robert Best as counsel. Thereafter on June 8th, 1965,

relator pleaded guilty to the crime of Murder in the second degree in full satisfaction of the indictment and subsequently on June 15th, 1965, he was sentenced to not less than twenty-five years nor more than his Natural Life. It is the plea of guilty entered on June 8th, 1965, that this instant petition is concerned with.

There are two major points, which relator contends, make his guilty plea invalid and involuntary, and violate his Constitutional rights under the Fourteenth Amendment. These points are:

(1) There was no attempt to determine if a factual basis for the plea existed and the plea was entered without an understanding of the nature of the charge to which the plea was being entered; and,

(2) That the plea of guilty was not entered knowingly and intelligently with an apprehension of the consequences of entering such plea; and,

(3) That the two aforesaid points made the plea invalid and involuntary and thus violated and continues to violate relator's rights to Due Process and Equal Protection of Law under the Fourteenth Amendment to the Constitution of the United States.

Point One

Question: Can a plea of guilty in second degree murder be considered valid and voluntary when there is no attempt by the trial court to determine if there is a factual basis for the plea; and if defendant does not know or understand the nature of the charges to which he is pleading guilty?

Your relator alleges, and the pleading minutes fully substantiate the allegation, that there was no attempt by the Trial Court to determine if there was a factual basis for

the plea of guilty to Murder in the second degree that relator was entering.

Relator further alleges that there was the attempt by court counsel or prosecution to inform him of the nature of the charges to which he was pleading guilty, nor was any attempt by court, counsel or prosecution to inform him of the nature of the charges to which he was pleading guilty, nor was any attempt made to determine if relator himself understood that by pleading guilty to second degree murder he was admitting not only that he had killed the deceased, but that he had intended to kill her.

In New York State, at the time the plea was entered the essential, indeed the only elements comprising the crime of Murder in the second degree was:

> "A design to effect the death of the person killed, or of another." (See: Old Penal Law Section 1046)

Your relator alleges that he never, at any time, had any intent, desire or "design" to effect the death of Ada Francisco. That had he known that by pleading guilty he was in effect admitting such design he would not have entered the plea. Furthermore, had the Trial Court instituted an inquiry into the facts and circumstances surrounding the case this lack of intent would have become readily apparent, and the court would not and could not have accepted the plea. Relator contends that it would have been a simple matter for the Trial Court to have instituted such inquiry, the court could have said in effect "do you understand that by peading guilty to second degree murder you are admitting that you intended to kill Ada Francisco?" or alternatively have asked relator to tell in his own words the facts and circumstances of the crime. However, for all of the Trial Court's expressed desire that

relator understand what was happening, and understand the charge, the fact is, that the Trial Court to see that that desire was fulfilled, did nothing more than make the mere statement.

The need to institute some form of inquiry from a defendant who is pleading guilty, so that he knows the nature of the charge to which he is pleading, and so the trial court will know that there is some factual basis for accepting the plea has long been recognized in New York State (See People v. Serrano (1965), 15 N Y 2d 304, 258 N.Y.S. 386, 206 N.E. 2d 330; *People* v. *Seaton,* 19 N Y 2d 404). In Serrano, supra, the defendant charged with murder in the first degree offered to plead guilty to murder in the second degree. The Court before accepting the plea asked defendant about the crime, Serrano admitted the killing, but denied intent, the court accepted the plea. The Court of Appeals, in reversing, stated:

> "Where trial court, before accepting plea of guilty, properly inquires of defendant as to circumstances of crime to which he is admitting guilt, *mere mouthing of the word 'guilty may not be relied upon to establish all elements of crime; in such case, requisite elements should appear from defendants own recital* and, if circumstances of crime as related by defendant do not clearly spell out crime to which plea is offered, Court should not proceed, without further inquiry to accept guilty plea as valid one."

Relator contends that an intelligent layman could not, without some indication from either the court, or counsel, or someone, be expected to know that second degree murder required intent on the part of the accused, and without such knowledge he could not be said to understand the nature of the charges to which he was pleading, and the plea itself would be robbed of the factual basis needed to

make it valid. Without the foregoing the layman, no matter how intelligent in other matters could not be said to be entering a knowing and intelligent plea of guilt.

In the instant case the Trial Court was not dealing with an "intelligent layman" but with a youth, just turned 19 years of age who had had no prior experience with criminal courts. A youth moreover, whose chronological age was 19 years old, but, whose mental age was that of a 8 or 9 year old child (See: Reports of Rome School attached to Appellant's Brief to Appellate Division, pages 12 thru 27), a youth who had been classified as a moron with an I.Q. between 68 and 75, who could read, write and comprehend only at the second grade level, and do only simple addition as far as mathematics was concerned.

During the course of the sentencing, relator's counsel, Mr. Reinhard made this comment (See: Record on Appeal, Sentencing Minute, pg. 32.) indicating his own doubts as to relator's intent to kill.

> ". . . But I'm sure that our investigation shows that at that time, he meant no harm to that lady."

Relator urges this Court that counsel's comment should have alerted the Trial Court to his, relator's lack of "design to effect the death of the person killed" especially since from the time of arraignment and through the pleading and sentencing, the court had been made completely aware that it was dealing with a mentally defective person. This is shown throughout the record (See: Record on Appeal, Arraignment Minutes, page 8; Pleading Minutes, page 21; Sentencing Minutes, pages 29, 30, 31, 35, 40 and 42).

In *Durant* v. *United States,* 410 F 2d 689 (1st Circ.), the Court there indicated that the presence of counsel at the moment of entering the plea does not relieve a court of its responsibility to make an inquiry of defendant before ac-

cepting the guilty plea, in order to insure that such a plea is voluntarily made with an understanding of the nature of the charges and the consequences of the plea. Of course relator realizes that the First Circuit was concerned with Federal Courts, but he suggests that the responsibility on State Court Judges can be no less if pleas of guilty are to be validly and voluntarily made by state defendants.

As far back as 1927, the United States Supreme Court in *Kercheval* v. *United States,* 274 U.S. 220 at 223, showed its concern that pleas of guilty be accepted only after proper advice and full understanding of the consequences, when it stated:

> "A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction, like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty not be accepted unless made voluntarily after proper advice and full understanding of the consequences."

While it is true that the circumstances in *Kercheval, supra,* are different from those in the instant case (no counsel in Kercheval) relator has cited that case for the Court's language and to show its concern with the need that guilty pleas be entered understandingly to be voluntary.

A case which has many similarities to the instant case is *Monroe* v. *United States* (Fifth Circ.), 463 F 2d 1032. There too, was a situation with a mentally deficient defendant. In Monroe, supra, the Trial Court made inquiries of defense counsel and the prosecutor to establish the intent necessary to constitute the crime of second degree murder that was being pleaded to. The Fifth

Circuit in reversing stated at page 1035:

> "In such a context, and in the absence of any explanation shown to have been given to him of what constituted second degree murder, and of the possibility of manslaughter and of self-defense, it cannot be inferred that the defendant, 'borderline mentally deficient' with a mental age of 12 and unable to read, had sufficient understanding of the charge for his plea to be valid."

In the instant case no one ever even tried to establish intent. Unlike Monroe, supra, the Trial Court did not even question counsel, much less the defendant. Your relator alleges that in so far as his comprehension of the charge was concerned, murder in the second degree was just so many words and told him nothing which could lead him to make an intelligent plea of guilt.

For the foregoing reasons the Petition for Writ of Habeas Corpus should be sustained.

POINT TWO

Question: Can a plea of guilty to murder in the second degree be said to be entered validly and voluntarily when the defendant does not know and no one informs him of the consequences of entering such plea?

Relator alleges that at the time the plea of guilty to second degree murder was entered, he was not aware of the consequences of so pleading, and that no one, not the Trial Court, counsel, prosecutor or anyone else made him aware that he could be and would be sentenced to a term of imprisonment, the maximum of which would be his Natural Life, and, that had he known he would not have entered the plea. Relator further alleges that without knowing the consequences of pleading guilty, the plea could not be entered intelligently and knowingly and

understandingly, and that without being so entered, the plea itself is involuntary and invalid.

In the words of Judge Aldisery, speaking for the Third Circuit in *Berry* v. *United States*, 412 F 2d 189 at page 192, the Court there stated:

> "Except for capital punishment, no other consequence can be as significant to the accused as the period of possible confinement. When one enters a plea of guilty he should be told what is the worst to expect. At the plea he is entitled to no less—at sentence he should no more."

While it is true that Judge Aldisery was concerned with the mandate of Federal Rule 11, as are almost all of the Federal cases cited herein, your relator urges this Honorable Court that the criteria which establishes whether a plea of guilty is both valid and voluntary is applicable to both Federal and State courts, even though Federal Rule 11 is not. The criteria, that the plea be entered intelligently, knowingly and with an understanding of the nature of the charges and the consequences of the plea, is, relator argues, well established in law (*Kercheval* v. *United States*, 274 U.S. 220, 223). On the same subject see Orfield Criminal Procedure from Arrest to Appeal (1947 Ed) at page 300:

> "Since a plea of guilty is a confession in open court and a waiver of trial, it has always been received with great caution. It is the duty of the court to see that the defendant thoroughly understands the situation and acts voluntarily before receiving it."

See: also, *Commonwealth ex rel. West* v. *Rundle*, 428 P A 102, 105-106, 237 A 196, 197-198:

> "A majority of criminal conviction are obtained after a plea of guilty. If these convictions are to be

> insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged, and the permissible range of sentences."

In the instant case the only information relator had from the Trial Court was that the plea of guilty was the same as being found guilty after a trial by jury. Everything else was concerned with the sentence he could have received had he been found guilty of Murder in the First Degree, a charge he was not pleading guilty to. (See: Record on Appeal, Pleading Minutes, pages 21, 22 and 23).

The Court: You have to speak up so this man can take it down. I realize that, unfortunately, you have a low intelligence quotient, and I want to make sure, as a court, that you understand the charge and what is happening here, and that you understand it, not your attorneys. Do you understand that you are formerly charged, at the moment, by the Grand Jury of Fulton County, for the Crime of Murder in the First Degree, upon conviction of which you could be incarcerated for the rest of your life? Do you understand that?

The Defendant: Yes, sir.

The Court: Do you understand that you are accused of killing one Ada Francisco in this county, is that true? Do you understand that?

The Defendant: Yes, sir.

The Court: Do you understand that what has occurred here in this courtroom in the last few minutes is a statement by your counsel, whom you requested to represent you, is that true?

The Defendant: Yes, sir.

The Court: And that you plead guilty to a lesser charge, that is Murder in the Second Degree, and that that be in full satisfaction of the indictment charging you with Murder in the First Degree, do you understand that? Do you understand that if you plead to Murder Second then the charge of Murder First is not, thereafter, against you. It would be in satisfaction of that or in place of that. Do you understand that?

The Defendant: Yes.

The Court: Do you understand also, that as I advised you of your rights when you were arraigned, that a plea of guilty to any crime is the same thing as having been tried by a jury and, after a trial, convicted by a jury. Do you understand that?

The Defendant: Yes, sir.

The Court: It is as though you had people in that box, and they had heard all the evidence, and then they had come out with the statement of guilty against you for Murder Second Degree. Do you understand that?

The Defendant: Yes, sir.

The Court: Now with that understanding, and having heard your attorney, what do you plead to, personally?

The Defendant: Guilty.

The Court: Guilty to what?

The Defendant: Second Degree.

The Court: Second Degree what?

The Defendant: Murder.

The Court: And this you do voluntarily and upon the advice of your counsel, is that true?

The Defendant: Yes, sir.

The Court: Do you understand, also, that if I ac-

cept that plea, that I must sentence from this Bench to prison. Do you understand that?

The Defendant: Yes, sir.

Throughout the whole of the proceedings there was not one word, not one single attempt made by the Trial Court to explain just what this Second Degree Murder consisted of. There was not one word said to indicate what sort of sentence could be imposed upon relator's plea of guilty. Indeed the only references concerning sentencing procedures only served to further confuse relator.

The trial Court's Statement that upon conviction for Murder in the First Degree, he could be incarcerated for life (Record on Appeal, Pleading Minutes, page 21), and the later statement, that by pleading guilty to Murder in the Second Degree, the charge of Murder First was no longer against him. These two statements of the Trial Court combined to lead relator to believe, erroneously as it turned out, that he could not be sentenced to life imprisonment. The subtle legal difference between natural life for Murder in the First Degree and Twenty-five years to Natural Life for Murder in the Second Degree, was beyond relator's limited mental capacity. Relator contends that had he known what the sentence was for second degree murder he would never have entered the guilty plea.

Some indication of the confused state of mind that relator had at the time of pleading can be seen from the piecemeal method the Trial Court had to go through in extracting the plea of guilt (Record on Appeal, Pleading Minutes, page 23).

The Court: Now, with that understanding, and having heard your attorney, what do you plead to, personally?

The Defendant: Guilty.

The Court: Guilty to what?

The Defendant: Second Degree.

The Court: Second Degree what?

The Defendant: Murder.

Relator actually believed that the questions put to him by the Trial Court were like a test. He did not want to be considered "dumb", and he was "being smart" by answering all the court's questions correctly; e.g. how the court wanted them answered. That he was in effect "being a good boy" and that by answering "Yes sir" when the court asked him anything or suggested anything to him; even though the multi-syllable words and legal verbiage were incomprehensible to him, would show the court that he was "polite" and then the court "would like him" and "not be mad at him anymore." As can be seen from the reports from the Rome School (Attached to Appellant's Brief to Appellate Division, pages 12 thru 27) relator likes to be liked and tries hard to please.

In *Tucker* v. *United States,* 5th Cir., 409 F 2d 1291, at page 1293, the Court said:

> "It is well settled that the plea of guilty is invalid as not being understandingly entered if the defendant does not know the maximum possible penalty for the offense. *Marvel* v. *United States,* 380 U.S. 262, 85 S. Ct. 953, 13 L. ed. 960."

See, also *U. S. ex rel. Hill* v. *United States,* 5th Cir. 452 F 2d 664, 655; *Marvel* v. *United States,* 380 U.S. 262.

For the foregoing reasons the Petition for Writ of Habeas Corpus should be sustained.

Conclusion

Therefore, your relator, Timothy Gordon Morgan, alleges that for the foregoing reasons his Constitutional

Petition for Writ of Habeas Corpus.

Rights to Due Process and Equal Protection of Law, guaranteed by the Fourteenth Amendment to the Constitution of the United States have been and are being violated.

Relator is proceeding in the instant petition as an indigent person and would respectfully request that the Court obtain any records, not submitted as exhibits by relator, that this Court may require from the State under Authority of 28 U.S.C. 1651.

Relator respectfully submits that under the rules and holding in *Townsend* v. *Sain,* 372 U.S. 293 (1963), this Court should inquire into the Constitutional issues raised and hold a full and fair evidentiary hearing in the instance.

WHEREFORE, relator prays the Court to issue the Writ of Habeas Corpus commanding respondent to produce relator before the Court at a term, on a day and at a time certain to be named, for a full and fair evidentiary hearing to be held on the issues herein raised and on the basis of such hearing to sustain the Writ and order relator discharged from custody forthwith and/or remand relator back to the State Court of original impression for further proceedings as may be instructed; and for such other and further relief as to this Court may appear proper and just.

(Sworn to by Timothy Gordon Morgan, December 20, 1972.)

Memorandum-Decision & Order Denying Petition for Writ of Habeas Corpus and Granting Leave to Proceed in Forma Pauperis, September 26, 1973.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Clerk of the court has sent to me for my consideration a petition for a writ of federal habeas corpus, together with an affidavit in forma pauperis and for the assignment of counsel, from a state inmate presently confined in the Auburn Correctional Facility.

The relator alleges that he plead guilty in the Fulton County Supreme Court on June 8, 1965, to Murder 2nd degree and was sentenced on June 15, 1965, to a term of 25 years to life. No appeal was taken. Relator did bring a petition for a writ of error coram nobis in the Fulton County Supreme Court on the ground that the trial court, at the plea taking, failed to ascertain whether or not there was a factual basis for the plea. Specifically, relator alleges that the court made no attempt to ascertain whether or not the essential element of "a design to effect the death of the person killed" was present. Reator also alleged that the plea was not made with an understanding of the nature of the charges or the consequences of the plea, due, in part, to his I.Q. which is alleged to be between 68-75. The writ was denied without a hearing on June 3, 1971. The Appellate Division affirmed without opinion. *People* v. *Morgan,* 38 App. Div. 2d 1012 (3rd Dept. 1972). Leave to appeal to the Court of Appeals was denied on July 6, 1972. The petitioner has supplied this court with copies of his brief and record on appeal, as well as the brief of the People.

Memorandum-Decision & Order Denying Petition for Writ of Habeas Corpus and Granting Leave to Proceed in Forma Pauperis, September 26, 1973.

Boykin v. Alabama, 395 U.S. 238 (1969) is not applicable to the instant case. See, e.g., *United States ex rel. Rogers* v. *Adams,* 435 F.2d 1372 (2d Cir. 1970). The standard to be applied to the guilty plea herein is whether Morgan made a reasoned choice, voluntarily after proper advice and with a full understanding of the consequences. See *United States ex rel. Codarre* v. *Gilligan,* 363 F.2d 961, 964 (2d Cir. 1966).

An examination of the record on appeal demonstrates a protective and solicitous attitude, on the behalf of the court, toward the defendant's interests. For instance, at the defendant's arraignment on April 15, 1965, in the Fulton County Supreme Court, the court appointed the two attorneys[1] that the defendant wished to represent him.[2] In addition, at arraignment, the court indicated every willingness to make itself and official records of the defendant readily available to defendant's counsel.[3] The court's concern regarding the defendant's background and its investigation of his circumstances and situation is further revealed in the trial judge's comments on the sentencing.[4]

On arraignment the indictment for Murder 1st degree was read to the defendant in the presence of his two attorneys,[5] and the court explained to the defendant his right to a jury trial and to subpoena witnesses in his behalf

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[1] Robert Best, Esq., and Floyd Reinhart, Esq. The latter was reported to have been one of the ablest and most competent trial attorneys in the area.

[2] Minutes of Arraignment, p. 4.

[3] See *Minutes of Arraignment,* pp. 8-11.

[4] See *Minutes of Sentence,* pp. 40-43.

[5] *Minutes of Arraignment,* p. 5.

Memorandum-Decision & Order Denying Petition for Writ of Habeas Corpus and Granting Leave to Proceed in Forma Pauperis, September 26, 1973.

and that a plea of guilty would be the same as being convicted after a trial by a jury.[6] The defendant affirmatively indicated that he understood what the court had told him.[7]

It should also be noted that a psychiatric examination of the defendant was ordered by the court, and that as a result thereof, he was found competent to stand trial, capable of understanding the charge against him, and of assisting in his defense.[8]

On the taking of the plea of guilty on June 8, 1965, the court made a special effort to emphasize to the defendant the gravity and importance of his change of plea.[9] The court asked the defendant[10] whether he understood: a) that he was accused of killing the victim, b) that a plea of guilty was the same as being convicted after a jury trial of Murder 2nd degree, and c) that he would be sentenced to prison. The defendant answered in the affirmative to each of these questions.[11] In addition, the trial judge asked the defendant if he fully understood what he was doing and if he was doing this voluntarily and upon the advice of counsel; the defendant again responded in the affirmative.[12] Further, defendant's mother and two brothers were present with him in the courtroom when he changed his plea to guilty.[13]

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[6] *Minutes of Arraignment,* pp. 5-7.

[7] *Minutes of Arraignment,* pp. 6-7.

[8] See *Plea Minutes,* p. 18 and *Sentence Minutes,* p. 41.

[9] *Plea Minutes,* p. 9.

[10] See pp. 21-23 of *Sentence Minutes.*

[11] I do.

[12] See p. 23 of *Plea Minutes.*

[13] See p. 25 of *Plea Minutes.*

Memorandum-Decision & Order Denying Petition for Writ of Habeas Corpus and Granting Leave to Proceed in Forma Pauperis, September 26, 1973.

An examination of the sentence proceeding of June 15, 1965 easily reveals that the defendant's attorneys had made a full and complete investigation of the case before advising him to plead guilty to the lesser charge.[14]

Finally, it should be noted that petitioner did not raise any challenge to his plea until five years after he had been sentenced.

After an examination of all the papers herein and a consideration of all the circumstances surrounding the taking of the plea, I am convinced that Morgan made a reasoned choice; voluntarily and after proper advice from competent counsel, and with a recognition that said choice would result in a prison term. Therefore, I do not find that petitioner was deprived of due process of law and the petition herein will be denied and dismissed.

For the reasons herein, it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted and the Clerk is directed to file the papers herein without the payment of fees.

EDMUND PORT
United States District Judge

Dated: September 26, 1973.
Auburn, New York.

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[14] See pp. 28-35 of *Sentence Minutes.*

Decision of United States Court of Appeals for the Second Circuit Granting a Certificate of Probable Cause, Reversing Dismissal of Petition and Remanding Case to District Court for an Evidentiary Hearing, dated December 12, 1973.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[SAME TITLE]

A motion having been made herein by relator pro se for a certificate of probable cause, for leave to proceed in forma pauperis and for the assignment of counsel.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is GRANTED to the extent that a Certificate of Probable Cause shall issue. Dismissal of the petition is reversed. The case is remanded to the district court to conduct an evidentiary hearing on the issues raised by petitioner, including whether, at the time of his entry of his guilty plea, he was aware that intent was an essential element of the crime and was advised of the scope of the punishment that might be imposed. The district court is instructed to appoint counsel to represent petitioner.

IRVING R. KAUFMAN,
Chief Judge.

IRK WRM WHM

WALTER R. MANSFIELD,

WILLIAM H. MULLIGAN,
Circuit Judges.

Minutes of Evidentiary Hearing in the United States District Court for the Northern District of New York, Held May 3, 1974, Auburn, New York.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A hearing in the above-entitled matter was held pursuant to notice at the United States District Court in and for the Northern District of New York, at Auburn, New York, on May 3, 1974, before Hon. Edmund Port, United States District Judge.

(2) APPEARANCES:

JOSEPH E. LYNCH, Esq., Attorney and Counsellor at Law, Metcalf Plaza, Auburn, New York, Assigned Counsel appearing on behalf of the Petitioner;

and

HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Justice Building, Albany, New York, By: JOSEPH CASTELLANI, Esq., Assistant Attorney General of Counsel, appearing in behalf of Respondent.

(3) The Court: Alright, you may call the case.

The Clerk: United States of America, ex rel Timothy G. Morgan against Robert J. Henderson, Superintendent, Auburn Correctional Facility, 73-Cv-440.

Mr. Lynch: Ready on behalf of the petitioner, Your Honor.

Colloquy.

The Court: Both sides ready?

Mr. Castellani: Ready, Your Honor.

The Court: Alright. Now gentlemen, is there any—do either one of you want to make an opening statement?

Mr. Castellani: No, Your Honor.

The Court: Petitioner?

Mr. Lynch: No, Your Honor, I don't believe it is necessary.

The Court: Alright, I will take your proof.

Mr. Lynch: I wonder if on behalf of the petitioner I may have marked and offered in evidence the sentencing, which I believe is part of the court's file.

The Court: Yes.

Mr. Lynch: I think Your Honor has them.

(4) Mr. Castellani: Your Honor, I have copies of it if you wish them. I have a copy of the sentence and the plea—the transcript.

The Court: I want to be sure what is being offered here is what is on file, then we can identify it and make it part of the record.

Mr. Lynch: Alright.

The Court: I assume this is what you are referring to (indicating)?

Mr. Lynch: Yes, Your Honor.

The Court: That is part of the record on appeal in the Appellate Division?

Mr. Lynch: Yes, sir.

(Sentence and plea marked as Petitioner's Exhibit Number 1 for identification.)

Mr. Lynch: I would like to offer it in evidence if I may, Your Honor.

The Court: Any objection?

Mr. Castellani: No objection.

The Court: Received.

(Petitioner's Exhibit Number 1 for identification received in evidence.)

Mr. Lynch: Timothy G. Morgan, please.

TIMOTHY G. MORGAN, (5) the petitioner, called as a witness in his own behalf, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Lynch:

Q. Now will you speak up Mr. Morgan so we can all hear you here? A. Yes, sir.

Q. Will you tell me if you don't understand any of the questions asked you? A. Yes, sir.

Q. How old are you, Mr. Morgan? A. Twenty-eight.

Q. How much schooling have you had? As far as the seventh grade.

Q. Did you get to the seventh grade by passing each of the preliminary grades? A. No, sir.

Q. Let me ask you quickly, do you recognize that you have less than normal intelligent capacity? A. Yes, sir, I do.

Q. You have been told that? A. Yes.

Q. And you recognize it? A. Yes.

(6) Q. Were you passed on from grade to grade simply because of your size and not because you had successfully completed the grade that you were passing? A. Yes.

Q. Be sure if you don't understand my questions that you tell me. A. I don't understand.

Q. Were you passed from grade to grade because of your size? A. Yes.

Q. Now Mr. Morgan, did there come a time in 1965 when

you were accused of murdering Mrs. Ada Francisco? A. Yes.

Q. Do you know the crime that you were charged with originally? A. First degree murder.

Q. Did the court appoint some attorneys to help you in your defense? A. Yes, sir.

Q. Who were they? A. Mr. Rinehart and Mr. Best.

Q. Are those the two gentlemen that are seated behind the rail in the courtroom? A. Yes, sir.

Q. Did there come a time, Mr. Morgan, when you pled to the (7) charge of murder in the second degree? A. Yes.

The Court: Pled guilty, I assume you mean?

Mr. Lynch: Yes, if my question didn't indicate that it was meant to, Your Honor.

By Mr. Lynch:

Q. Now, Mr. Morgan, at that time did you understand what conduct a person had to engage in to be guilty of the crime of murder in the second degree? A. I don't understand what you are saying.

Q. You don't understand the question? A. No.

Q. Alright. Did you know then, when you pled to this crime, what the crime consisted of? A. No.

Q. Did there come a time later when you learned some more about the crime of murder in the second degree? A. Yes.

Q. And where was that that you gained this additional knowledge? A. After I got in Auburn, about five years later.

Q. When you say Auburn, you mean the prison in Auburn? A. Yes.

Q. Did you have some discussions with people in prison about that particular crime? (8) A. My two friends.

Q. Your two friends. Those are inmates of the Auburn Correctional Institution? A. Yes, sir.

Q. What did you learn at that time about the crime that you pled to? A. They said you have to prove intent.

Q. Intent to kill a human being? A. Yes.

Q. Was that the first time Mr. Morgan that you knew that that was part of the proof of conduct of a person charged with murder in the second degree? A. Yes.

Q. You have not known that before; is that right? A. No, sir.

Q. Did you have any intent to kill this woman? A. No, sir.

Q. If you had been told, Mr. Morgan, at the time of your plea that your plea was to a crime which required you to have an intent to kill this woman, would you have pleaded to murder in the second degree? A. No.

Q. Is that because you did not have such an intent? A. That's right.

Q. But you did plead to murder in the second degree; is that (9) right? A. Yes.

Q. When you pleaded to that charge, did you know the maximum punishment that the court could impose on you? A. I don't understand what you are saying.

Q. Alright.

Mr. Castellani: I can't hear him, Your Honor.

The Court: You will have to keep your voice up Mr. Morgan. You are mumbling and your chewing gum makes it hard for the attorney to hear you.

(Witness removes gum from his mouth).

The Court: That's right. That is a good idea. Put it in the wastebasket.

The Witness: I am sorry.

The Court: Alright.

Mr. Lynch: May I have the last question?

(The court reporter repeated the question as above recorded.)

By Mr. Lynch:

Q. Mr. Morgan, at the time of your plea, did you know what you were going to be sentenced to? A. No, sir.

Q. Did you know what you might be sentenced to? (10) A. No, sir.

Q. Did anyone ever tell you what the maximum punishment was that the court could impose on you as a result of pleading to this charge? A. I don't understand the question.

Q. You knew, did you not Mr. Morgan, that if you pled to this charge some kind of punishment was going to be imposed on you; is that right? A. Yes, sir.

Q. But you did not know what that punishment was going to be? A. No, sir.

Q. Did you know what it might be? Did you know what the most serious punishment that could be imposed upon you was, if you made this plea? A. No, sir.

Q. Now did you know, Mr. Morgan, that as a result of making this plea you could be sentenced to twenty years to life? A. No.

Q. If you had known that before you pleaded, would you have pleaded to murder in the second degree? A. I don't understand the question.

Q. You don't understand. Alright. You had some discussions did you not with your attorneys, the men that were help- (11) ing you, Mr. Best and Mr. Rinehart; did you not? A. Yes.

Q. Did you, did they advise you to plead guilty to murder in the second degree? A. Yes, sir.

Q. And do you remember that? A. I don't.

Q. Did they tell you what sentence the court might im-

pose upon you if you pleaded? A. For first degree or second degree?

Q. No, for second degree. A. No.

Q. So that you did not know what you were exposing yourself to by way of sentence when you made that plea; is that right? A. I still don't understand what you mean.

Q. I think you told us that you didn't know at the time that you pled what sentence you were going to receive; you didn't know that? A. No, sir.

Q. My question to you is if you knew—strike that if you will please. Did you know what sentence the court might impose on you? In other words—

The Court: Did you know that you could go to prison?

(12) The Witness: For which one?

The Court: For either one.

The Witness: Yes.

The Court: Did you know that you could go to prison for second degree?

The Witness: Yes. But I didn't think I would get so much time.

The Court: Did you know that you could go to prison for as long as life?

The Witness: No.

By Mr. Lynch:

Q. Did you know that you could go for as long as twenty-five years? A. For first degree, yes.

The Court: No, for second degree.

The Witness: I didn't know for second degree.

The Court: What did you think was the sentence that you could get for second degree murder?

The Witness: I figured it would be a lot less than what it was. I didn't think it was going to be life, otherwise I would never have done it.

By Mr. Lynch:

(13) Q. Mr. Morgan, if you had known that you were exposing yourself to a sentence that could be as little as twenty years and as long as life, would you have pled guilty to murder in the second degree? A. No, sir, I wouldn't.

The Court: Now did you understand that question?

The Witness: Yes, sir.

By Mr. Lynch:

Q. You are not still answering my questions. Is there any question I asked you about understanding this, that you don't understand? A. I am confused.

Q. Let me see if I could summarize. Did you ever intend to kill this woman? A. No, sir.

Q. If you knew that the State had to prove that you had an intent to kill her, to convict you of murder in the second degree, would you have pled to murder second? In other words, if you knew that they had to prove that you intended to kill her, would you have pled to murder in the second degree? A. No.

Q. If you knew that you were exposing yourself to a punishment that could run as high as life imprisonment, (14) would you have pled to murder in the second degree? A. No.

Mr. Lynch: Thank you, Mr. Morgan. You may ask.

Cross-Examination by Mr. Castellani:

Q. Mr. Morgan, this petition that you submitted to the Federal Court, did you prepare it? A. No, sir.

Q. Who did? A. Two friends of mine.

Q. Did you read it? A. No.

Q. Did you sign it? A. Yes.

Q. Did you swear to it before a Notary Public? A. Yes, sir.

Q. And still you didn't know what you actually signed? A. I knew what was in it.

Q. How did you know? A. Because my friends went over it with me.

Q. But did you read it? A. What I could, yes.

Q. You were just asked and told me that you didn't read it before you signed it. Which is it? (15) A. I read what I could of it.

Q. What did you read of it? A. I looked at it.

Q. How about this notice of appeal, did you draw that up this typewritten notice of appeal? A. Yes, sir.

Q. Did you sign it? A. Yes, sir.

Q. Did you read it before you signed it? A. No, sir.

Q. Still you swore to it before a Notary Public? A. Yes, sir.

Q. Mr. Morgan, at the time of the commission of this crime were you satisfied that you were well represented by Mr. Rinehart and Mr. Best? A. No.

Q. Did you object? A. No.

Q. Why didn't you, if you were not satisfied? A. Because I didn't think I was going to get what I got.

Q. What did you think you were going to get? A. I didn't think I would get life. I thought I would get a lesser plea.

The Court: Lesser plea or lesser sentence?

The Witness: A lesser sentence.

(16) The Court: What sentence did you think you were going to get, about how many years?

The Witness: I don't know.

The Court: You just expected it to be less than what you got?

The Witness: I figured second degree you are not going to get as much as you are for first.

The Court: Is that what you had in mind that you wouldn't get as much as you would get for first?

The Witness: If I went to trial and was found guilty in the first degree, I knew I was going to get life. In second degree, I didn't know.

By Mr. Castellani:

Q. Mr. Morgan, you were indicted for murder first? A. Yes, I was.

Q. Did you know what the punishment was, punishment for murder first? A. Yes, sir.

Q. What was it? A. Life in prison.

Q. What else? A. That is it.

(17) Would you have been willing to stand trial— A. (Interrupting) Yes, sir.

Q. (Continuing)—on your crime that you were accused of? A. Yes sir, I would.

Q. Why didn't you? A. Because he told me I was going to get a lesser plea.

Q. Who told you that? A. Mr. Rinehart.

Q. Mr. Rinehart told you what? Say that again? A. I was going to get a lesser plea.

Q. A lesser plea?

The Court: Just think of what you are saying. Sentence, is that what you mean?

The Witness: Yes.

Timothy G. Morgan—Cross.

By Mr. Castellani:

Q. Did he tell you what you would receive if you were found guilty or if you pled guilty to murder first? A. Yes.

Q. What did he say? A. He said if I went to trial in the first degree that I could get life.

Q. And what did he say to you if you were to plead guilty to murder first? A. He said I would get a lesser sentence.

Q. First degree? (18) A. To murder first. That is what he said, murder first.

Q. Then he never advised you what would happen if you were to stand trial for murder first and found guilty? A. Me?

Q. Whether you understood that? A. I don't know, I am confused. I don't know what you are saying.

The Court: Well did you have any discussions with your lawyers, did you talk with your lawyers about pleading guilty to first degree murder or was that talk just related to the trial of first degree murder?

The Witness: That was for first degree.

The Court: Yes, but did you talk about pleading to it or standing trial or both?

The Witness: They told me to take second degree, to plead to the second degree.

The Court: Did they tell you what would happen if you were convicted of first degree?

The Witness: Yes. They said if I went to trial and blew the trial that I could end up in prison for the rest of my life.

The Court: You could get a life sentence?

The Witness: Yes.

Timothy G. Morgan—Cross.

The Court: Now did they you what you (19) would get on second degree?

The Witness: No.

The Court: Did they tell you whether it was lesser, the same, or what?

The Witness: They said if you take second degree you get a lesser plea.

The Court: Get a lesser sentence?

The Witness: Lesser sentence, right.

By Mr. Castellani:

Q. But they didn't tell you Mr. Morgan, what the lesser sentence would be— A. (Interrupting) No.

Q. (Continuing) —if you pled guilty to murder two? A. No.

Q. Did you ask them? A. No.

Q. Why not? A. I don't know.

Q. You don't know why. Don't you think you should have asked them? A. I did what they told to do.

Q. So that you were satisfied with their representation? A. I figured they knew what they were doing, yes.

Q. Who are those two friends of yours that drew up the petition and notice of appeal? (20) A. His name is Paul Ganvi and Gene Boch. The other guy is gone. He went to another institution.

The Court: The other guy was your Court of Appeals lawyer?

The Witness: Yes.

The Court: He drew the notice of appeal.

By Mr. Castellani:

Q. You say, you answered on direct examination, that you went to the seventh grade? A. Yes, sir.

Timothy G. Morgan—Redirect.

Q. And what happened? A. They just passed me on.

Q. What happened after seventh grade, did you quit school? A. No, I got kicked out.

Q. Then what did you do? A. I was sent to Rome.

Q. Have you had any schooling since you have been confined to prison? A. Six months.

Q. What would you say your average intelligence is now? A. I don't know. It was a low average.

Mr. Castellani: That is all, Your Honor.

Re-Direct Examination by Mr. Lynch:

Q. Mr. Morgan, so there will be no question about it, (21) to the extent that you were able, did you look at the petition that you signed? A. Yes.

Q. And you went over it with your friends? A. Yes.

Q. And you understood that that petititon was asking this Court for relief for you? A. Yes.

Q. That they correct what you consider to be errors on the part of an earlier court? A. Yes.

Q. Your attorneys told you that if you stood trial on the first degree murder charge you could get life imprisonment? A. Yes.

Q. And you didn't want to take that chance, did you? A. No.

Q. You actually got a sentence when you pled to murder second of twenty-five years to life; is that correct? A. Yes, sir.

Q. And if you knew that that sentence could have been imposed on you, as it was, you told me, did you not, that you wouldn't have pled to it? A. That's right.

Q. Because basically in your eyes that is the same sentence (22) that you would have received if you were convicted for murder first; is that right? A. Yes.

H. Andrew Schlusberg—Direct.

Mr. Lynch: Thank you, Mr. Morgan. That is all, Your Honor.

Mr. Castellani: No further questions, Your Honor.

(Witnessed excused.)

Mr. Lynch: Petitioner rests at this time, Your Honor.

The Court: Alright. That is all. You may go ahead Mr. Castellani.

Mr. Castellani: Call Mr. Schlusberg.

H. Andrew Schlusberg, called as a witness in behalf of the respondent, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Exemination by Mr. Castellani:

Q. Mr. Schlusberg, you are duly qualified as an attorney to practice law in the State of New York. A. I am.

Q. Were you an attorney during the year 1965? A. Was I what?

Q. An attorney. (23) A. Yes.

Q. Were you acting in an official capacity during the year 1965? A. I was.

Q. And what was that official capacity? A. District Attorney of Fulton County.

Q. District Attorney of Fulton County. Mr. Schlusberg, during the course of your duties as District Attorney of Fulton County, were you involved in the case of the People of the State of New York vs. Timothy G. Morgan? A. Yes, I was.

Q. Do you recall the nature of that crime? A. I do recall that.

Q. And what was the crime that was committed by him?

Mr. Lynch: I object to the form of the question. I have no objection to the charge, to the nature of the crime, although I don't know that the nature of the crime has any significance in this hearing. If the question is given to elicit a factual description of what took place, I won't object to it.

The Court: Overruled. I think that is a question that goes to the very issue that we are concerned with here as to whether or not it was a reason choice. Of course if it (24) appeared under the facts that this was clearly an incident or understanding, that would be one situation that would enter into the reason or lack of a reason choice. On the other hand, if it appears it was a border kind of act, it would also enter into in a contrary fashion a reasonable choice.

Mr. Lynch: Could I ask permission to sit here because I have some difficulty hearing.

The Court: Of course, and I will ask Mr. Schlusberg if he would keep his voice up.

The Witness: Alright.

By Mr. Castellani:

Q. Mr. Schlusberg, as a representative of the People in that case, were you present at the time he was arraigned of the crime of murder first? A. I was.

Q. At that time was he represented by counsel? A. He was.

Q. And who represented him? A. Two attorneys. Mr. Floyd J. Rinehart and Mr. Robert Best.

Q. Were you acquainted with both of those attorneys at the time? A. Very well.

(25) Q. Were you also present at all stages of the preliminary proceedings in this case including the time of his plea? A. It was my recollection that I was present.

Q. And who else from your office was with you at the time? A. It is my recollection—I think I looked at the file of course, and the Assistant District Attorney was Mr. James Persico.

Q. Is he here present in the courtroom? A. Yes, he is.

Q. And were you and Mr. Persico also present—I am not sure whether you answered my question, at the time of the plea? A. Yes I was and he was too.

Q. To go back a little, Mr. Schlusberg, he was indicted of murder first? A. That's right.

Q. Did he plead to that charge? A. No. Well, his regular plea was not guilty.

The Court: Isn't that the mandatory plea, or wasn't that the mandatory plea at that time?

The Witness: You are right, Your Honor.

By Mr. Castellani:

Q. And at the time of his plea to murder two, did you have occasion to discuss that particular plea with the Judge, (26) your Assistant, Mr. Persico, and the two assigned counsel? A. That is my recollection, that there was opportunity, there was discussion between Mr.—assigned counsel, Mr. Persico and myself.

Q. Was it agreeable with all parties including Judge Soden at that change of the plea to murder second would be acceptable? A. That is correct.

Q. And then there came a time when the defendant was brought into court and he was prepared to plead to murder two? A. That is my recollection.

Q. And he did this in the presence of his assigned counsel, did he not? A. Yes, it was.

Q. And also your Assistant, Mr. Persico? A. Yes.

Q. And of course the Judge? A. Yes. And members of his family as well were there.

Q. What members of his family were there, do you recall? A. Brothers and sisters.

Q. Was his mother there? A. I have no such recollection.

Q. Was his father there? (27) A. I don't recall.

Q. Were you also present at the time he was sentenced—

A. (Interrupting) Yes I was.

Q. (Continuing) —to murder two? A. Yes I was.

Q. And was your Assistant, Mr. Persico, also present there? A. Yes he was.

Q. And was Mr. Rinehart and Mr. Best also present? A. They certainly were.

Q. And of course so was the defendant? A. Yes.

The Court: Just to refresh your recollection, it is my recollection from having read the sentencing minutes that Mr. Best had been excused from attendance by the court. Does that refresh your recollection any?

The Witness: Now that you mention it, Your Honor, I have not seen the file. The file was turned over, of course, to my successor but I recall, now that you remind me Your Honor, that Mr. Best had some other duty or some other business and that Mr. Rinehart was there.

By Mr. Castellani:

Q. So Mr. Best was not there and present at the time of the sentence?

(28) The Court: If you don't recall, it is easy enough to tell us.

A. I don't recall without looking at the record.

Q. In any event, if not both of his attorneys, one of them was there? A. That is for sure.

Q. And you don't recall which one? A. My recollection which is now refreshed by His Honor, it was Mr. Rinehart who was there and Mr. Best had some other business or function and could not stay.

Q. Mr. Schlusberg, to the best of your recollection, did the court explain to the defendant the nature of his plea, the possibility of the punishment involved and did he further convey to you the impression that Mr.—did the Judge convey to you the impression that he was aware that the defendant understood the nature of the proceeding that was taking place at the time?

Mr. Lynch: I will object to that question.

The Court: Sustained. I am sure Judge Soden wouldn't have taken the plea otherwise.

By Mr. Castellani:

Q. Mr. Schlusberg, in your mind, do you recall to the best of your recollection, did this defendant understand what he was pleading to? A. Well, the—

(29) The Court: Sustained.

Mr. Lynch: I object to that, Your Honor. I don't believe—

The Court: Sustained.

Mr. Castellani: I have no furth r questions, Your Honor.

Mr. Lynch: I may have no questions for the witness, but I wonder if the former District Attorney's file was here and if I may have a quick opportunity to look at it.

The Court: I don't know. Is the file here?

Mr. Castellani: I have a file that is very voluminous.

The Court: I will tell you what I will do. Make the file available to counsel. I have some other business to take care of but while I am giving you the opportunity—I appreciate you have not had an opportunity to talk with your witnesses. I know I convened court as soon as they walked into the courtroom. I can recess this case until 2:00 o'clock.

Mr. Castellani: Your Honor, are we finished with this witness?

Mr. Lynch: Let me say, on the basis of the direct examination, I have no questions of (30) the witness. There might be something in the file—

The Court: Let me ask you this, Mr. Schlusberg. Do you have any objection to continuing your visit here in Auburn until this afternoon?

The Witness: I have none, Your Honor.

The Court: Alright, you are a welcome guest.

Mr. Castellani: Your Honor, I of course have no objection to staying here all day, but I do hope you have in mind the fact that my witnesses came a long way and are hoping that they can get back home in this inclement weather.

The Court: I centainly won't detain them beyond the necessity of the case.

Mr. Castellani: Is it at all possible that we can continue before 2:00 o'clock?

The Court: I doubt it. Yes, you want to recess until 1:30, if that is satisfactory, and if that is satisfactory you can let the Clerk of the Court know and the Court will be available.

Mr. Lynch: I have no objection on behalf (31) of the petitioner.

The Court: Alright. This Court will recess until 1:30. The Marshal will provide for the petitioner.

(Whereupon at this point a recess was taken in this matter until 1:30 P.M. o'clock of the same day.)

(32) AFTERNOON SESSION

Appearances: (Same as Morning Session).

The Court; Alright, Mr. Lynch, you may proceed.

Mr. Lynch: If the Court please, I have no questions of Mr. Schlusberg.

The Court: You have any need for Mr. Schlusberg?

Mr. Castellani: No, Your Honor.

The Court: You are excused, Mr. Schlusberg.

(Witness excused).

Mr. Castellani: I would like to call Mr. Rinehart.

FLOYD J. RINEHART, called as a witness in behalf of the Respondent, being first duly sworn by the Clerk of the Court, was examined and testified as follows?

Direct Examination by Mr. Castellani:

Q. Mr. Rinehart, you are duly licensed to practice law in the State of New York? A. I am.

Q. Where is your office located? A. Amsterdam, New York.

Q. What county is that? (33) A. Montgomery.

Q. Montgomery County, adjoining Fulton County? A. Yes, it is.

Q. And you were practicing there during the year 1965? A. Yes, sir.

Q. Mr. Rinehart in the year 1965, were you involved in the case of the People of the State of New York vs. Timothy Morgan? A. I was.

Q. And in what capacity? A. Assigned counsel.

Q. Assigned counsel? A. With Mr. Robert Best.

Q. Was that before or after the arraignment of Mr. Morgan? A. I think it was at the arraignment.

Q. You think it was at the arraignment that both you and Mr. Best were assigned together? A. We were assigned together, yes.

Q. And you were both present there at the arraignment? A. My recollection is that we were.

Q. After you were assigned to the defendant, Mr. Morgan, did you have subsequent conversations with him regarding the charges in the indictment? A. Well you see this is supposed to have occurred on the 7th of April, 1965. The grand jury, as I recall, was in (34) session, and the indictment was returned on the 15th of April, 1965, and we discussed that with our client, discussed it, we made various motions, tried to obtain the alleged confessions there, tried to change the venue, discussed it with the District Attorney, went over the facts to find out what the circumstances were, trying to get ready for trial.

Q. Did you also discuss the matter with any members of his family? A. Yes. He had two brothers and his mother who were there and there were some other members of his family—I don't know whether they were the wives of the brothers or who they were.

Q. And now Mr. Morgan was indicted for the crime of murder first; is that correct? A. Yes.

Q. Did you inform Mr. Morgan at the time of the possible punishment that would be involved if he was tried and found guilty on murder first? A. Yes. While I don't recall my exact words at this time, murder first was punishable by death in the electric chair.

The Court: Are you referring to the time of the indictment?

The Witness: Yes. April 15, 1965.

(35) By Mr. Castellani:

Q. Did you inform the defendant of that possibility? A. Well I can't remember my exact words of course. I told him that he could go to the chair for his crime if he got convicted of murder first.

Q. Did the defendant in your judgment realize the distinction of the punishment that would be involved in the event he was found guilty of murder first?

Mr. Lynch: I will object to the question on the ground it calls for a conclusion. If he wants to elicit facts—

The Court: I will take the substance of the conversation.

The Witness: Your Honor, this involved a lot of publicity. The papers were filled with it. The radio and television also. So that possibility was discussed with him, but I can't remember the exact words.

The Court: Well you say you are sure of the possibility, that is the possibility of a death sentence.

The Witness: Yes.

The Court: In the event of a conviction.

The Witness: That's right, sir. I am sure I told him if he got convicted of murder first, (36) he would go to the electric chair, if it were not—

Q. In other words, you as defense counsel realized in your mind that this was a premeditated murder?

Mr. Lynch: Object to the form of the question as leading.

A. No, how would I know that. I didn't say that. My argument to the District Attorney was that it wasn't. That it happened on the spur of the moment.

The Court: You were the advocate. You were assigned to defend this man.

The Witness: Yes, and I wouldn't start off with that.

By Mr. Castellani:

Q. After giving the matter some thought in your own mind, did you feel that he could possibly be found guilty of murder in the first degree? A. Well, I have been through this stuff before. There is always a possibility if you are indicted for murder first, and the jury may convict you of murder first. This involves the death of a woman and there was some feeling in the community there and I didn't know what could happen.

Q. Did you and Mr. Best confer and give some thought to a lesser degree than murder first? (37) A. Yes. I thought manslaughter first would satisfy the needs of justice in this case. We argued that with the District Attorney time and time again, but he wouldn't budge.

Q. Did you discuss this with Mr. Morgan? A. I don't know that we discussed it with him, except he knew we were doing the best for him.

Q. Was there discussion with his family on that? A. I think so, on the date the plea was entered up in Court in Johnstown.

Q. Did they know he was going to plead? A. Yes, we discussed it and arranged for the plea on that day.

Q. Did you feel that a plea to murder second was in his best interest? A. There was not much choice of best interest. Murder second is pretty severe. Murder first at that time carried the electric chair or life imprisonment, and I thought that manslaughter first would be sufficient but we couldn't get it without a trial.

Q. Did you have some discussion with the District Attorney and his Assistant, and with your co-assigned counsel that it would be best to plead to murder second? A. Well, we argued this. You know these arguments were better between the District Attorney and his office and Mr. (38) Best and myself. We thought that we were looking it all over and that murder second would be twenty-five years. I thought that manslaughter first would be sufficient, but we couldn't get it, and we were confronted with the possibility that he might go to the electric chair. It just so happened that they abolished the electric chair in about, I think, June or July of 1965 when there was a Bill before the Legislature.

The Court: But at the time the plea was entered, the conviction could have carried either the death penalty or life imprisonment.

The Witness: I don't think it could have. The death penalty, I think the Governor signed that Bill sometime before—was it June 15th or July 15th, and it was on April 15th that he was indicted. Was it June 15th of the sentencing?

By Mr. Castellani:

Q. June. A. June 15th. I think the Governor signed that Bill just shortly before that so that the death penalty had been eliminated.

The Court: So the penalty then would have been what?

The Witness: Life imprisonment.

(39) The Court : Mandatory life imprisonment?

The Witness: Yes.

The Court: So what you were faced with was an alternative of conviction for the first degree murder carrying a mandatory prison sentence or a plea of guilty to second degree murder carrying a minimum of what, if you recall?

The Witness: I thought twenty years to life. Then at the last minute the Judge said it has got to be twenty-five.

The Court: In any event you knew it was some length, with a minimum of twenty?

The Witness: Yes, sir.

The Court: And a maximum of life.

The Witness: Yes, it was a minimum of twenty years to life, but it wound up with twenty-five to life.

The Court: You didn't have any assurances of what the actual sentence was going to be?

The Witness: Yes, I knew exactly what the sentence was going to be before I entered the plea of guilty.

The Court: From whom?

The Witness: From the District Attorney.

(40) The Court: Did you discuss it with the Court?

The Witness: I am pretty sure I did. I always have had to, well, talk to me about it. I can't recall exactly now, Judge.

The Court: Would your file indicate?

The Witness : No, I didn't keep a record of that but Mr. Best knows—I don't know if Judge Soden said to us—we talked to the District Attorney in his office and he talked to the Judge, and we finally got the report that the least that they would consider would be murder second, at which the sentence would be twenty-five years to life.

The Court: That is you were told that that would be the sentence.

The Witness: Yes.

The Court: I see. So the sentence was the sentence that you were told he would have.

The Witness: Yes, there was no surprise on the sentence. I knew what it was going to be.

The Court: Did you advise the defendant of that?

The Witness: We did, yes, sir.

The Court: Was the defendant's family (41) there at the time?

The Witness: Yes, sir. Yes, sir. They were there.

The Court: Do you recall when that was, Mr. Rinehart?

The Witness: I think it was on the 8th of June, 1965.

The Court: Can you fix that with reference to the date of the actual sentence?

The Witness: The actual sentence was on the 15th of June. I think. And this was on the 8th of June, 1965.

The Court: Was this after the plea was entered?

The Witness: We entered the plea one day and they adjourned it for a week, and the time of sentence was on the 15th.

The Court: At the time of the plea were you aware of the sentence?

The Witness: Oh, yes.

The Court: And you conveyed that to the defendant prior to the entry of the plea?

The Witness: Oh, yes. I couldn't do it otherwise.

The Court: At that time you were practicing (42) law for how long?

The Witness: 1927. Nearly forty years.

The Court: And you have been actively engaged in the practice of criminal law?

The Witness: Yes, I have had quite a bit of criminal law.

The Court: I think in one of these things you were referred to as one of the leading criminal lawyers in the area.

The Witness: They all wind up getting treated as criminal lawyers. I did a lot of criminal work. I do a lot of cases, but I never can remember disposing of a case unless I was reasonably assured what the sentence was going to be.

The Court: Of course you never practiced in this Court.

The Witness: If they wouldn't tell me then I would say, "Let's take our chances on the jury."

The Court: But that was the practices and that is what you are satisfied occurred here?

The Witness: Yes, because some Supreme Court Judges say they don't want anybody to plead guilty unless they know what the sentence (43) is going to be. Others are very indefinite on that, so you have to deal with the District Attorney.

The Court: In this particular instance you are satisfied you knew and the defendant knew exactly what the sentence was going to be?

The Witness: Yes, because I felt that the extra five years was putting it on too hard, because I was familiar with other cases where the Judge made the sentence fifteen years to life and years later the Judge tried to get it reduced and the Governor wouldn't reduce it. That happened on different occasions. But yes, I knew what the sentence was going to be and I told my client.

By Mr. Castellani:

Q. Did your client make any objections or comments regarding the possibility of a twenty-five to life sentence,

if you recall? A. At that time he wanted to get rid of the case possibly because of the pressure and his mental capacity to handle the situation with a low IQ and so forth. At that time, my recollection is, we were there in a room, and the question was whether we would enter a plea or (44) get ready to proceed to trial, and my recollection is he wanted to get rid of it and I didn't go into details about the consequences or anything.

Mr. Castellani: I have no further questions.

The Court: You say you didn't go into the details of the consequences, but did you understand the difference between first and second degree murder?

The Witness: No. Just that one involved life imprisonment and the other was a certain period of years.

The Court: You distinguished between first and second degree murder?

The Witness: By the sentence.

The Court: By the punishment to be imposed?

The Witness: Yes, sir.

The Court: Rather than by the proof necessary.

The Witness: Yes, sir. I didn't go into detail of what constituted murder first and what constituted murder second. As a rule, a defendant is only interested in the sentence, and the time.

(45) Mr. Castellani: No further questions, Your Honor.

Cross Examination by Mr. Lynch:

Q. Mr. Rinehart, I am sure as an experienced trial counsel you will recognize that you were dealing with a young man who obviously didn't have the same IQ or in-

telligence as a normal young man of that kind would? A. We had all the records from the Rome State School.

Q. And he had been variously characterized as a moron? A. Sure.

Q. I think you told us incidentally you can't remember the exact words with which you advised this young man, but it is your firm recollection that you told him what the punishment would be? A. I told him of course what the punishment would be, yes.

Q. And that was the punishment that he received? A. I think I said, "We can get you off with murder second," and I am not so sure that I said, "I recommend that you accept it" is what I probably did, but Mr. Best was present at any time I talked with Mr. Morgan.

Q. At the time of sentencing, Mr. Rinehart— A. (Interrupting) That is the 15th of June, 1965.

Q. (Continuing)—on the 15th of June, 1965, do you recall pointing out in substance to the sentencing Judge that (46) your investigation revealed the possibility that this young man had meant no harm to this woman? A. They made a record of it.

Q. Could we look at Exhibit 1? A. Didn't I make a statement to the Court before he sentenced him? Didn't I? I always do.

Q. Would you like to refresh your recollection at page 32, Mr. Rinehart and particularly the top most part of the page and after reading that yourself, see if it refreshes your recollection? A. (Reading) "On the 6th of April, 1965, he went down to the room of his employer, Mrs. Annie Francisco, he took a knife with him, and I am sure at that time he meant no harm to his employer."

The Court: That is, of course, a plea for leniency.

The Witness: Yes. I was still hoping to get it down to twenty years.

By Mr. Lynch:

Q. Incidentally, I think you said at the last moment you were still hoping for a twenty year minimum sentence? A. Yes.

Q. And at the last moment they refused to go along with that? A. Yes. When you negotiate with the District Attorney you (47) have to get a reduction of the sentence from then on.

The Court: You mean a reduction of degree?

The Witness: Yes. And then a reduction in the time involved.

By Mr. Lynch:

Q. And in conclusion, Mr. Rinehart, I think you told us you didn't point out the elements of the crime to this young man? A. No. No. We had the statements he was supposed to have made. We made application to the Court and got an order permitting them to be turned over.

The Court: Did you advise him as to your opinion as to the result of a conviction of second degree murder after a trial?

The Witness: I don't think so.

Mr. Lynch: I have no further questions.

The Court: Did you advise him that an intent, for instance, could be found from his act?

The Witness: No, I never entered into that because I know the circumstances surrounding it.

Re-direct Examination by Mr. Castellani:

Q. Mr. Rinehart, one more question. When you went over (48) the facts and the circumstances of this crime

with the defendant, did he explain to you what happened just before he committed the crime, that he went to the victim's room and argued with her and events that led up to the commission of the crime? A. Well you know there was no conflicting conversation between the defendant and his lawyers as you can see and it just couldn't be different. You had to get it in dribs and drabs and my impression was that he went there to get his own money, he was getting a salary there and she was keeping for him, and he went there to get the money and she started screaming and so forth and then these events happened.

Q. Did he describe to you the actual commission of the crime? You knew that? A. Of course I knew it. Everything carried this.

The Court: We are not relying on newspapers, but did the District Attorney have statements or confessions from the defendant?

The Witness: Yes.

The Court: And did they outline the events occurring on that particular night?

The Witness: It happened in Fulton County and he took an automobile and went from Fulton County up to Elizabethtown, one hundred miles (49) away, before he had an accident. He was hospitalized up there, and that is where the State Troopers got a statement as to the circumstances because following the event, after the discovery you know, there were radio appeals made that went out to apprehend him.

The Court: I am sure with your experience you must have felt that there was a likelihood of his being convicted of second degree, or you wouldn't have pled him to it.

The Witness: You know, the feeling was pretty high in the county and we couldn't get a change of

venue and I was satisfied he wouldn't get much consideration from a jury.

The Court: And were you satisfied that the D.A. had sufficient evidence so that a jury verdict would stand up?

The Witness: You know, I have had lots of cases at home, and I was satisfied that he would be prosecuted vigorously and that he would make out a case on him.

By Mr. Castellani:

Q. Mr. Rinehart, in reference to your testimony today, with regard to your representation of this defendant at the time of the commission of the crime and subsequent, (50) and prior to the plea, did your associate, Mr. Best, concur in all these decisions that were made between you and the D.A., you and the Court, and you and the defendant? A. Well he was doing just as I was doing in it. We worked together and we discussed what was the best thing to do in the matter and to see what we could do to build a defense, and he drew up most of the papers and prepared them and went into, very thoroughly, into the law, and I think he talked to Mr. Morgan more than I did.

Q. Did he relay the substance of his conversations with Mr. Morgan to you which may or may not have directed you to arrive at the conclusion to recommend a plea of second murder?

Mr. Lynch: I think I would object to that question as being too vague.

The Court: I will let Mr. Rinehart answer it if he can.

The Witness: He and I both thought we were doing the right thing except we thought the sentence was too severe.

The Court: This had excited your hopes,—I can say it excited cause you knew what to expect, but it excited your hopes by five years (51) on the minimum. You were hopeful of having the statutory minimum imposed instead of that five years above the statute.

The Witness: Yes. And at that time there were Bills in the Legislature to limit the sentence for murder second, to do away with the fifty years to life and forty years to life and cut it down to twenty. I was satisfied no matter what the sentence was going to be, he would eventually wind up with twenty anyway. As far as hoping to walk out of the courtroom with an acquittal with a case like that, it just didn't seem possible to me.

The Court: Is there anything further?

Mr. Castellani: I have no further questions.

Re-cross Examination by Mr. Lynch:

Q. Mr. Rinehart, is it a fair summary of what you told this young man after talking with the District Attorney and possibly with the Judge and knowing the differences between sentences, did you tell him in substance that he would be sentenced to twenty-five years in prison? A. I am positive of that.

Q. You are positive of that? A. Yes.

(52) Mr. Lynch: Alright. Thank you very much, Mr. Rinehart.

(Witness excused.)

Mr. Castellani: I have no further witnesses, Your Honor.

The Court: No further witnesses?

Mr. Castellani: I must explain to you that Mr.

Best is in the courtroom and I feel in view of Mr. Rinehart's testimony, I wouldn't call him to testify unless you want him.

The Court: I am not going to conduct either the petitioner's case or the respondent's case, but if there is anything that Mr. Best can add, of course, I would be glad to have him. If there isn't, if it is just corroborative, I don't think I need it.

Mr. Castellani: May I put Mr. Best on the stand, Your Honor.

The Court: Alright.

Robert P. Best, called as a witness in behalf of the Respondent, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Castellani:

(53) Mr. Best, you are an attorney duly licensed to practice law in the State of New York? A. Yes, sir.

Q. And as an attorney you were practicing during the year 1965? A. Yes, sir.

Q. Where was your office located? A. In Gloversville.

Q. In what county? A. Fulton.

Q. And during the course of your practice, particularly during the year 1965, were you assigned as co-counsel to the defendant in the case of People vs. Morgan? A. Yes, Timothy Morgan, yes, sir.

Q. And you heard the testimony of Mr. Rinehart. Do you concur in what he testified to? A. Yes, sir.

Q. Now in addition, Mr. Best, did you discuss this matter with Mr. Morgan? A. Yes, I did.

Q. Did you go into the facts with him carefully? A. Yes, sir.

Q. What was the nature of that conversation that you went into the facts with Mr. Morgan as to the commission of this crime? (54) A. Well, as I recollect, and it has been awhile ago, that he had had a falling out with this lady two days before this event and he had—

The Court: Now you say this is a discussion now. Are you telling this to Morgan or Morgan telling it to you?

The Witness: He is telling it to me. I delved into what happened.

The Court: This is in response to—

The Witness: My questions.

The Court: Is this before or after you had access to the statements obtained by the District Attorney?

The Witness: I think we had a conversation in the jail before we had the statement, yes, sir. We talked in the jail.

By Mr. Castellani:

Q. Will you go on and relate what the conversation was? A. Well he was concerned about—the lady was concerned about having him stay out later than he should. I think she hit him on this particular occasion at this argument, and as I understood it, she threatened him that if he didn't stop seeing this girl and come home on time, she would tell the people from the Rome State School, and that he would have to maybe go back to the (55) Rome State School, and this he didn't want to do. So on the particular occasion he went, on this night, he went to go down and get his money and take off. Because the next day they were supposed to come from the Rome State School and he didn't want her to tell them that he had been out doing something wrong.

Q. What did he tell you happened that night? A. Well he went down and he had a knife with him and he went into her room to get his money and he woke her up. She started screaming and he stabbed her.

Q. Did he tell you what he did following the stabbing? A. He took her car and took off. He took some money and then took her car.

Q. Where did he go, do you know? A. Well he went generally north.

Q. And where was he apprehended? A. He was apprehended on his way to Elizabethtown.

Q. In miles, how far is that from Jamestown? A. It is quite a ways. I don't know exactly how many miles. Probably in the vicinity of 80 miles, 90 miles, or maybe more.

Q. Did he tell you that he was apprehended and he made a statement to the State Police that he committed a crime? A. Yes.

(56) Q. Referring back to Mr. Rinehart's testimony, did you concur or do you concur with him and did you concur at the time that it was to Mr. Morgan's best interest to plead to murder second? A. Under the circumstances, yes, sir.

Q. And were you aware of the punishment that might be involved? A. Yes.

Q. In a plea of murder second? A. Yes.

Q. And was Mr. Morgan aware of it? A. Yes, sir.

Q. And what was that punishment? A. We were told it would be twenty-five years to life.

The Court: That was part of your plea bargaining.

The Witness: Yes it was, sir.

Mr. Castellani: That is all.

The Witness: We were trying to have it twenty years to life. We were arguing for that.

The Court: And of course Mr. Rinehart told us that you concurred and the defendant was given that information.

The Witness: Yes, he was.

(57) The Court: Before the plea was entered?

The Witness: Yes, he was. Yes, sir.

Mr. Castellani: That is all.

Cross Examination by Mr. Lynch:

Q. Did Mr. Morgan tell you, Mr. Best, that the money he was going to get was the money he had earned working on this farm? A. That is what he told me, sir. Yes, sir.

Q. Actually, as you have indicated, it was his intention to take the money and leave so he could not be sent back to the School? A. That was his story, yes, sir.

Q. Didn't he also tell you, consistent with that plan he had, bathered his possessions and put them on his person, and he went down to get the money? A. Well, I don't recall that detail.

Q. But he might have? A. Yes, but I don't remember.

Q. And this knife that he had was one of his possessions? A. Yes, sir.

Q. Did he also tell you that it was in the argument that this woman started to scream and he struck her to quiet her? A. Yes, sir.

(58) Q. I think you said you did concur in Mr. Rinehart's testimony as to the information and how it was passed onto Mr. Morgan? A. Yes, sir.

Mr. Lynch: I think that is all.

The Court: Just one question I would like to know, did he describe or did you see the weapon, the knife?

The Witness: It was a hunting knife. I don't

think it was ever shown to me. It was found in the car, as I recollect it, which he was involved in the accident with, in the glove compartment, but I don't believe it was ever produced into evidence. We did get the statements that he made.

The Court: But you are satisfied it was a hunting knife, not a pocket knife?

The Witness: I understand it was a hunting knife, as I recollect it.

The Court: And his first endeavor to stop the screams, I gather from what you told Mr. Lynch, was he struck her.

The Witness: I think so.

The Court: I inferred that he struck her, not cut her, didn't use the knife?

(59) The Witness: Not at first. She didn't stop screaming and then he used the knife many times. He didn't tell me that, but the allegation was that he hit her forty-five times with the knife.

The Court: That was some of the factors that you considered in making your choice, in selecting your options?

The Witness: Yes, sir.

The Court: Now, did you at any time tell him the difference between first degree murder and second degree murder, do you recall, other than the possible punishment?

The Witness: Well I honestly don't recall vividly the details of that, but I think that—

Mr. Lynch: If I may interrupt the witness, I have no objection to your refreshing his recollection.

The Court: If you can recall, or if there is anything that will help refresh your recollection, I will be glad to make it available, because that is of critical import here, or could be.

The Witness: We were arguing that it was a manslaughter case, and we were trying to (60) have things go along that way. Whereas the prosecution was arguing that it was murder first. The fact that they had a confession from him, that said he was attempting to rob her, and it was a felony murder.

The Court: Did they indict him for felony murder?

The Witness: No, it was a common law murder, as I recollect the indictment.

The Court: And you recall obviously because you concur in Mr. Rinehart's statement with the distinction between the degrees, as far as punishment is concerned was important?

The Witness: Yes, sir.

The Court: But you have no recollection of the essential elements?

The Witness: I think I recall talking to him in the jail and telling him that if this was the case it could be murder one; and if this was the case it could be murder two or manslaughter, if he had intent and thought it over beforehand and if he didn't have premeditation it could be manslaughter.

The Court: Were you in jail with him alone or with Mr. Rinehart?

(61) The Witness: There were times when I was in jail with Mr. Rinehart, but there were times I was with him alone.

The Court: Mr. Rinehart said you talked to him more.

The Witness: Yes.

The Court: That you looked up the law and talked to him more.

The Witness: Yes. I think so. I was in Gloversville and it was closer to the jail. Mr. Rinehart was in Amsterdam, which is a little further away.

The Court: Do you have any records in your file on that?

The Witness: I have it here.

The Court: Can you examine your file and see if you have any notes concerning conversations.

The Witness: I have some. Let me say this, I have some notes that I took on one occasion—I know I looked over this last night. This file has been gone over many times over the years by attorneys on behalf of—

The Court: I know there have been a number of proceedings. I don't want you to (62) think I am being critical. I examined this a whole lot different today than I would in 1965. I assure you of that.

The Witness: Yes, sir.

The Court: Today I virtually give them a charge.

The Witness: Your Honor, I have a note here of an interview with the defendant, but I don't seem to place my fingers on it right now, Judge.

The Court: Take your time.

The Witness: Yes. I find some notes here that I took on April 26th.

The Court: April 26th, '65?

The Witness: Yes, sir.

The Court: And what do they—is that in relation to a conversation? Look them over to see if they do anything to refresh your recollection.

The Witness: These notes that I have found, Your Honor, indicate that I took some of the history from the man but after he got out of the Rome State School, when he was on the Apolka Farm first, and that then he went to the Francisco Farm and with his brother (63) James and his brother Cliff, and I took their addresses so I could talk to them about what they knew about it. His brother Stanley—

he might know some of the details. Those are the only notes I have Your Honor.

The Court: They don't have anything to do with the matter I have inquired about?

The Witness: That is true.

Mr. Lynch: May I continue?

The Court: Yes.

By Mr. Lynch:

Q. Mr. Best, is it a fair summary of your testimony that what you are trying to recall is the events that transpired back in 1965? A. Yes, sir.

Q. You have of necessity to rely on your memoranda? A. That is correct.

Q. Faced, as you and Mr. Rinehart were, with representing a client charged with first degree murder and hoping, as you did, that you might be able to reduce the charge to manslaughter, recognizing the possibility that you might end up with murder second, the difference of those crimes was important to you? A. Yes, sir.

Q. In other words, in coming to a conclusion on your (64) chance of success or failure in representing Mr. Morgan you determined how you best could advise him, it was important for you that a knowledge of the difference in the crimes to explain to him the various elements that would get into one crime as compared to another; is that a fair statement? A. Yes, sir.

Q. Is it possible that your recollection of the discussion with Mr. Morgan is a discussion that you had with him to determine from him what happened so that you as his lawyer could determine the legal effect of what happened; is that a possibility? A. Well, it certainly is. I know that I tried to develop out of him—

Q. Sure. So that the purpose of these discussions was to permit you as his attorney, and Mr. Rinehart as your as-

sociate, to determine what advice you should give; is that a fair statement? A. Yes, sir.

Q. And after ten years is it a fair statment that your recollections of that incident of necessity had to be vague; am I correct? A. Yes.

Mr. Lynch: Thank you, Mr. Best. I think that is all.

(65) The Court: Anything further?

Mr. Castellani: Nothing further.

The Court: Alright, thank you, Mr. Best.

(Witness excused.)

Mr. Lynch: If the Court please, the Petitioner would like to call—

The Court: Has the Respondent rested?

Mr. Castellani: Yes, sir.

The Court: Alright.

Mr. Lynch: Mrs. Morgan, please.

Doris A. Morgan called as a witness, in behalf of the Petitioner, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Lynch:

Q. Mrs. Morgan, are you the mother of Timothy Morgan, sitting here at the counsel table? A. I am.

Q. Were you in the courthouse on the day in 1965, when your son was sentenced? A. I was.

Q. Do you have any recollection of the events of that day? I am talking about a conference between the lawyers and Tim? (66) A. You see I have been to Dr. Savage and at that time I was under sedation so that everything—I was there but—

The Court: You were waving your hands. Would you mean to indicate it was confused in your mind?

The Witness: Yes.

By Mr. Lynch:

Q. And is it correct that you have no recollection specifically? A. I could never give any true statements about what was said.

The Court: And you are now talking about the date when your son was sentenced?

The Witness: I think that is probably what I am talking about.

The Court: Is that what you were asked?

By Mr. Lynch:

Q. If I were to ask you about any other times—let me put it this way, Mrs. Morgan. This was a terrible trying time for you, as Tim's mother? A. Right, and still is.

Q. You were very upset throughout this entire period when he was first charged with these crimes? A. Yes.

(67) Q. Are you telling us that you can't assist us here, that you can't recall what took place during that entire period? A. I am sorry, but that is what it would be.

Mr. Lynch: Thank you, Mrs. Morgan.

Cross Examination by Mr. Castellani:

Q. Just one question, Mrs. Morgan. Even though you can't recall at this time, ten years later what took place at the time of the date of the sentence or before, is it possible that you were advised or taken into any discussions about your son's possibility of pleading? Is it possible that you were? A. They (indicating) would know.

Q. Did you talk to them during the course of these proceedings before your son was sentenced? Did you talk to Mr. Rinehart? A. I can't remember, truthfully. Honestly.

Q. Is it possible that you—did you take that much interest in this matter when you discussed it with your son's attorneys?

Mr. Lynch: I object to the form of the question as argumentative.

Mr. Castellani: This is cross-examination.

The Court: I will let her answer. Can (68) you recall now whether or not you either discussed it or were present during any discussions with either you or any other member of your family, with either Mr. Best or Mr. Rinehart, before your son was sentenced? The question is, do you remember being present, not what was said on being present?

The Witness: I think we all was.

Mr. Castellani: That is all, Your Honor.

Mr. Lynch: Thank you, Mrs. Morgan. That is all.

Mr. Castellani: If Your Honor please, I would like to put on the record that I am very grateful to these gentlemen to come all the way from Fulton County and Montgomery County to testify in this case voluntarily.

The Court: Mrs. Morgan, I am going to ask you to step down.

(Witness excused.)

The Court: The Attorney General indicated for the record his appreciation for both of you gentlemen having appeared voluntarily. Of course that goes for the Court as well, as to Mr. Schlusberg, the District Attorney. Of course the court is interested in determining (69) what the facts are primarily. It is only through proceedings such as this particular one when it is remanded by the Court of Appeals that the Court can make such a determination, and while I realize in many instances it creates a substan-

tial imposition on attorneys and judges that are involved in these cases and that the courts now are looking into these in the light of new writings, that none of us were particularly aware of or concerned about back ten or fifteen years ago, but as long as they deal with constitutional matters, of course, this is what this Court is here for and it is just what the Supreme Court states we are here for.

So I want you all to know that the Court appreciates your cooperation and it makes it much more pleasant for us, and when I say us, I am referring to Judge Foley and myself, to be able to receive the cooperation of the local offices, because we have to call on them—we have these writs and applications that run into the hundreds—and while most of them can be disposed of on State Court proceedings and records, we still have to obtain (70) them, and it is very often a major job to do that, and without the cooperation of the local District Attorneys, our work would be multiplied many-folds. So spread the word to your fellow District Attorneys that we appreciate the assistance that we get, when they supply us with old records in these cases and briefs, and to the lawyers, the Judges that are obliged to come in and testify.

Anything further?

Mr. Lynch: Your Honor, I would like to make a brief summation.

The Court: Evidence closed?

Mr. Lynch: Yes.

The Court: Anything further?

Mr. Castellani: Nothing further.

The Court: Alright. Evidence is closed. You can make a brief summation.

Mr. Lynch: If the Court please, as Your Honor realizes the Petitioner attacks the validity of the sentencing procedure under which he is presently confined, on two basic

grounds. One, that he was not advised of the elements of the crime for which he pled and was never told of the punishment to which he (71) was exposing himself by the plea.

I submit there are two areas of dispute here. There is, of course, a factual question of which Your Honor will have to resolve in which Mr. Morgan says on the one hand he was not told of the elements of the crime or the punishment he was going to receive, and then there is a pure question of law, if you will, which I submit arises out of the admitted facts.

Directing myself briefly to the ultimate dispute, as I review the evidence in my mind, the testimony that has been received, it could be taken at its strongest for the stated self, that it is clear that this young man was never advised specifically of the elements of the crime to which he was contemplating the guilty plea.

Mr. Rinehart quite candidly said he didn't get into this kind of discussion with Mr. Morgan, and as a trial attorney I can't understand that, and I don't mean to be critical of Mr. Rinehart, but Mr. Morgan is a person of diminished intellecutual capacity.

Under the laws of this State—

(72) The Court: So that we focus on the same area, I won't be concerned with the laws of this State. I am concerned with the deprivation of constitutional right.

Mr. Lynch: Maybe my terminology was poorly chosen. It is our position that the constitutional right of this young man was not given to him in the sense that the plea he made was not within the confines of his intellectual capacity, because he was not told the necessary information. And it is our further position that the sentencing court had the facts in front of it which under the procedural law of the State which addresses itself to his constitutional rights, compelled that Court to take an action

which it didn't take. That is the legal question, the factual question as to did he have this knowledge. He says he did not. And the question of intent being a specific element of the crime, Mr. Rinehart said he didn't tell him this and Mr. Best says he concurs with Mr. Rinehart. He has some recollection of the different crimes, of the different requirements of the crimes.

I think Mr. Best honestly recalls distinctly (73) that this conversation, whatever it was, was not meant for the purpose of limiting this Petitioner to the element of the crime that he was charged with that he might plea to or hope to attain for him. I think that conversation shows the purpose that Mr. Rinehart and Mr. Best had, and what they thought they could do for him. A conversation such as that to a young man of diminished intellectual capacity is of no assistance to him to making a judgment within the ability he has, on June 8, 1965, some two months later.

I say to you that the facts so at the time he entered the plea, the plea was not voluntarily and intelligently made because he never received the information required to make it. And furthermore, if you find that there was some conversation with him some two months prior that that would of necessity not last in this young man's mind in that it was incumbent upon him to know at the time of the plea what the elements of the crime was to which he was pleading.

He said if he knew this he would not have pled.

(74) The testimony of the State most favorable to them is that he didn't know on the question of punishment. The only thing I would say, I expected Mr. Rinehart to say in answer to my question that he told this young man that he would receive a sentence of twenty-five years. If that is true—

The Court: I don't remember that.

Mr. Lynch: I believe there is testimony to that effect.

The Court: I got the distinct impression that the sentence was twenty-five years to life, and that Mr. Rinehart knew that and advised the defendant. I think at that stage, at least, it is my impression that Mr. Rinehart was addressing himself to the minimum, that is bargaining for the minimum provided by statute. I referred to that not knowing that the maximum was life, but Mr. Rinehart is still here, and if there is any confusion about that, I will permit a reopening so the direct question can be put to Mr. Rinehart.

Mr. Lynch: I do not object to that procedure.

The Court: I think that my recollection (75) which is as fresh now as it would ever be—

Mr. Lynch: I wonder if I could direct a question to Mr. Rinehart?

The Court: Yes. Mr. Rinehart is already sworn. The record may indicate that we reopened to put this question to Mr. Rinehart.

Mr. Lynch: Mr. Rinehart, did you tell Mr. Morgan that the sentence he would receive was twenty-five years or did you tell him twenty-five years to life, or do you know for certain?

Mr. Rinehart: I think it was twenty-five years. I don't know if I put that "to life" in there. I am not sure.

Mr. Lynch: So you may have told him twenty-five years.

Mr. Rinehart: Yes.

The Court: Alright. That is far better than having any misunderstanding on the record about it.

Mr. Castellani: I think this points up—

The Court: Now the evidence is closed.

Mr. Lynch: I think this points out that this young man inadvertently, I am sure, was under a misapprehension of the sentence he was going to receive. I can see him saying, "Alright, (76) twenty-five years is one thing, but twenty-five years to life is something else."

Colloquy.

And I say the evidence on behalf of the People on both elements, taken at its highest, would reflect an overturning of the decision.

Turning to the legal aspect and I think I said it in my brief, I think that the sentence came at a time when the Court knew that there was a possibility that this young man may not have formed the required intent. Let me say to you, if at that time that Court—

The Court: Well the intent, I think there is a factual basis from the evidence where it, that is the jury would have a right to infer on the mere fact, I think when he hit her first and then used the knife, that there were multiple knife wounds, that the jury could infer, and as a matter of fact, I think from those same facts the Judge would have to permit the jury to decide as a question of fact whether there was premeditation on first degree murder, so that this man was a long way short of being out of the woods.

So I am satisfied that there was a factual basis for the entry of the plea.

(77) I am satisfied that the bargaining was an exercise of good judgment and caution, particularly when counsel referred to the emotional atmosphere prevailing in the community and the refusal of a change of venue, but I don't think we need address ourselves to that because in any event that is not before the Court. This is not one of the grounds here. And I don't know if it were, whether that has been exhausted in the State Court.

Mr. Lynch: I think it is in the sense that the procedures that the New York State Common Law prosecute for situations of this nature really are merely procedural methods in which you satisfy yourself, if you were the sentencing Judge, that the plea is voluntarily and intelligently made. Here is a Judge who is alerted to the possibility that the crime that is being pled to, the elements, may not exist.

Colloquy.

I am not suggesting that the jury may not have found those elements. At that point the Court has to determine if the defendant knew what he was doing.

The Court: Well, at that point, of course, Boykin had not been decided. Boykin is not (78) retroactive. So that Judge Soden did not have to spread on the record this man's intelligent waiver or the voluntariness of his plea if it appeared to him. Now that should have appeared through some other sources, but I don't know. Is it any place in the facts before me? It is no place except in the testimony I have. But I think we can confuse the duty of a Judge since Boykin and prior to Boykin. The trial judge had a different duty imposed. Now a coram nobis judge has another proposition, whether or not he was obliged to do what I had been ordered to do, which is hold a hearing. And that is what this hearing is all about. I think it focuses down on the circumstances of whether this is a voluntary plea.

I didn't mean to cut you off.

Mr. Lynch: I have called to the Court's attention those aspects of the evidence and the law that I deem important in making your decision.

The Court: Alright. I will hear Mr. Castellani.

Mr. Castellani: Briefly, I would have reference to the mandate of the Circuit Court (79) to this Court that the issues should be confined.

The Court: Well, I don't think that they say the issues should be confined.

Mr. Castellani: Without spelling it out here.

The Court: They pointed out to me a couple of things I should not forget.

Mr. Castellani: Well, yes, intent and the severity of the punishment. Certainly the testimony today bears out that he had inintent, and that he knew that the punishment would be at least twenty-five years. And I think the testi-

mony definitely corroborates your decision of December 26 in this case when you denied the original application when you said after examination of all the facts herein and consideration of all the circumstances surrounding the taking of the plea, I am convinced that Morgan made a choice voluntarily, and asked prior advice by competent counsel and with the recognition that such choice would result in a prison term.

The Court: I think he did have that choice and that it would result in a prison (80) term, his own papers show that. The Court of Appeals indicated that he didn't make enough of a reasonable choice. That is why they sent it back. That is on the papers he didn't make enough of a reasonable choice and they thought that the papers didn't support the conclusions that I drew from them. And I find no fault with that judgment or remand.

It is a difficult thing when you see the Judge who made the effort in 1965, Judge Soden, made an effort to be fair. He is, of my own knowledge, one of the most eminent practitioners in criminal law, in that part of the State assigned to him and you see sincere efforts being made to protect his rights, and then you are confronted with the situation some years later where his friends in Auburn fine-tooth-combing the record, probably erroneously, relying upon Boykin, find that the record doesn't spread out the things that Boykin requires and the research on their part doesn't show that Boykin is not retroactive.

However, the man has raised what may be a constitutional mal-deficiency in his conviction. (81) That is what this Court is here for.

I think you gentlemen, I think you made no findings of facts and you probably could go over the record minutes here and embody them both together, together with the Petitioner's petition. So I will need whatever help you

gentlemen can give me on the legal questions. I think it would help if we assume, that if you fellows assume that plea bargaining was entered into in good faith, and that the best bargain available was made, and that it was made by competent attorneys, and there is some inference in the moving papers questioning the competency, but I don't think it is even necessary for me to pass on it. If it was, I will find against the Petitioner on that particular score.

But assume that he was indicted with first degree murder, and as a result of plea bargaining he was aware that a sentence of twenty-five years was going to be imposed, that with that knowledge, twenty-five years was going to be imposed on the entry of a plea of guilty to second degree murder. That no one outlined to him the distinctions or the differences in the (82) essential elements between first and second degree murder. In fact, assume that no one explained the elements of either first or second degree murder, except as they related to differences in punishment. With that exception, assume that the plea is involuntary. With those two omissions would they result in an involuntary plea as a matter of violation of the Fourteenth Amendment, being due process. I don't know off-hand the case that fits into the exact factual pattern, where a man knew essentially what the sentence was going to be, except I misunderstood Mr. Rinehart's testimony with regard to the maxium, which makes a difference.

That would be helpful to me. Can you gentlemen give me whatever law you can get on that.

Mr. Lynch: Certainly, your Honor.

The Court: Of course, I have not had much to do with murder cases. The little that I did have to do caused me to wonder very much if there was any difference between murder first and second degree.

If the conviction is set aside and the man (83) is allowed to re-plead, I think we can pretty well prognosticate what

the results of that would be and of course he has served so much time already, he must be nearing the time when his eligibility for parole comes up. But those considerations are not for me.

But you can help me gentlemen, if you can home in on that fine question.

Would ten days be sufficient?

Mr. Lynch: Yes, Your Honor.

The Court: Alright, thank you. And the State has not given me any suggested findings of fact. I would appreciate those.

Mr. Castellani: Yes, Your Honor.

The Court: The Petitioner is remanded to the custody of the Marshal for return to the State Institution.

Mr. Morgan, I want to say to you that you had good representation then and you have good representation now.

Mr. Lynch: Thank you, Your Honor.

The Clerk: Court stands in recess to Chambers.

(Whereupon the above-entitled matter was (84) concluded).

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Minutes of Arraignment in Supreme Court, Fulton County, April 15, 1965.

[SAME TITLE]

STENOGRAPHIC MINUTES of proceedings had in the above entitled action before Hon. HAROLD R. SODEN, Justice on Thursday, April 15, 1965, at a Trial Term of Supreme Court held in and for the County of Fulton, at the Courthouse in Johnstown, New York.

APPEARANCES:

H. ANDREW SCHLUSBERG, Esq., District Attorney.

THOMAS PERSICO, Esq., Ass't. District Attorney.

For the People of the State of New York.

(Appearances for the Defendant as hereinafter noted)

Mr. Schlusberg: Your Honor, we are ready to proceed with the arraignment of the People against Timothy Gordon Morgan!

(2) (The defendant appeared before the Court.)

Mr. Schlusberg: Your Honor, the Grand Jury of the County of Fulton, on the 13th day of April 1965 has returned an indictment against this defendant, charging him with the crime of Murder in the First Degree. He stands here before you!

The Court: Are you Timothy Gordon Morgan?

The Defendant: Yes, sir.

The Court: It is my duty to inform you that you have been indicted by the Grand Jury of Fulton County for a crime, upon conviction of which you might have to pay

with your life, or imprisonment in a state prison for a considerable period of time. Do you have an attorney?

The Defendant: Yes, sir.

The Court: Did you hire an attorney?

The Defendant: No.

The Court: Do you have any financial means to pay for an attorney?

The Defendant: No.

The Court: You mean you asked somebody to represent you for nothing, is that it?

The Defendant: I didn't ask anybody.

The Court: You didn't ask anybody. Do you (3) wish this Court to appoint an attorney for you.

The Defendant: No, I got Reinhart and another guy.

The Court: You got Reinhart, you say, and who else?

The Defendant: That guy (pointing) right there.

The Court: Another fellow over here?

The Defendant: Yes.

The Court: You mean you have consulted with them?

The Defendant: Yes. The other judge said they could be my lawyers.

The Court: The other judge said that.

The Defendant: Yes.

The Court: Well, you're here before me now. Are those the men that you want to represent you?

The Defendant: Yes.

The Court: Would you like me to appoint them for you?

The Defendant: Yes, sir.

The Court: Would you point out the men that you talked to, over here?

(4) The Defendant: (pointing) That guy with glasses.

The Court: Is that the man that you talked to?

The Defendant: Yes.

The Court: And did you also talk to Mr. Reinhart?

The Defendant: Yes.

The Court: Do you know who he is?

The Defendant: Yes, right there.

The Court: Well, if that is your choice of attorneys, and I think at least you know how to select attorneys, I will grant you that, they are both very competent men, I will appoint them for you.

The Defendant: Okay.

The Court: You need them.

The Defendant: I know.

The Court: I will appoint Mr. Floyd Reinhart and Robert Best to represent you.

(Both attorneys appeared before the Court and stood at the side of the Defendant.)

Mr. Schlusberg: Your Honor, May I at this time read the indictment in the defendant's presence and (5) in the presence of his attorneys.

The Court: Yes.

Mr. Schlusberg: The Grand Jury of the County of Fulton, New York, by this indictment, accuse the defendant of the Crime of Murder in the First Degree, committed as follows:

The Defendant, in the County of Fulton, New York, on or about the 7th day of April 1965, willfully, feloniously and of malice aforethought, stabbed and cut Ada Francisco with a dangerous knife, thereby inflicting divers wounds and injuries upon the said Ada Francisco, and that thereafter, on or about the 7th day of April 1965, the said Ada Francisco died of said wounds and injuries, said killing being inexcuseable and unjustifiable.

May the record show I am handing a copy of the indictment to his attorneys.

The Court: You don't mind taking your hands out of your pocket, do you, in front of the Court?

Minutes of Arraignment in Supreme Court, Fulton County, April 15, 1965.

(The Defendant did so.)

The Court: You are entitled to a jury trial of this indictment, and you are entitled to subpoena witnesses in your own behalf, and produce whatever evidence you feel is necessary in your defense. You are not entitled (6) to bail. I advise you that a plea of guilty to this indictment—of course which you can't do in Murder First, you could in some other crimes—that is the same as being tried by a jury and convicted at their hands, thereafter. And of course it is my duty also, under the law, regardless, to advise you that if you have heretofore been convicted of a crime, and if you are now convicted of this crime or some other crime under this degree, you may expect greater punishment than you would have received if you hadn't been heretofore convicted. Do you understand what I have told you?

The Defendant: No, I don't.

The Court: You don't. Well, I'm going to try once more. You can't plead guilty to Murder First. But you could possibly plead guilty to some crime below Murder First, I don't know, I'm not anticipating anything. I am just advising you of your rights. If you say you are guilty to a crime in connection with this indictment, it is the same as having been tried by twelve people in a jury box, and being convicted by them. Do you understand that?

The Defendant: Yes.

The Court: By saying you're guilty, it's the same as being convicted. Do you understand that now. Is (7) that clear to you?

The Defendant: Yes, sir.

The Court: All right. Now, also I advise you that in case this charge ever gets to any kind of charge where you could plead, that if you have heretofore been convicted of some crime before this, if you have been convicted of a

Minutes of Arraignment in Supreme Court, Fulton County, April 15, 1965.

crime and you are convicted of any other crime under Murder First, either by a jury or by saying you are guilty, do you understand that, that you may get greater punishment in that event than you would have received if you hadn't been heretofore convicted of a crime. Do you understand that now? In other words, this might be your second conviction. And if this is a second conviction either by a trial or by a plea, you have a chance under the law to get greater punishment than if it was your first conviction. Do you understand that now.

(The defendant shook his head in the negative.)

The Court: Well, that is the best I can do. Now, Mr. Schlusberg—?

Mr. Schlusberg: Well, he has been arraigned, and I think it is for your Honor to adjourn it to such time as you would like, to have a date fixed for trial, or of course such other proceedings.

(8) Mr. Reinhart: I would like to be heard before a date is set, your Honor. I assume that there has been a plea of not guilty entered on the record, sir.

The Court: Yes.

Mr. Reinhart: This defendant had been confined for some time prior, heretofore, to the Rome State School for Mental Defectives, and we are making an application before this Court as soon as we can to get permission to examine those records.

We would also like a psychiatric examination and we'll make an application in due course for that. Then, by reading the papers, Mr. Best, who is a resident up here, informs me there were some statements made in the paper as to what the defendant told the District Attorney orally and in writing. And so I assume that Mr. Best and I will make a motion to investigate that, and have the Court pass upon that, to see whether or not that was a voluntary

Minutes of Arraignment in Supreme Court, Fulton County, April 15, 1965.

statement made, or what the circumstances were surrounding it. So we'll need some time in this matter, as Your Honor understands, I know.

The Court: I can readily understand that, Mr. Reinhart. I will expect that you will make an application with all due speed for the matters that you just indicated (9) to the Court. I will cooperate with you at any hour of the day or night in that regard.

Mr. Reinhart: I know.

The Court: When I'm here. You can come into this court at any time you want, and even though there is a trial on, we'll take a recess. Of course you realize that I'm scheduled to hold a term in Schenectady county next month, and I can't be in two places at one time. The earliest I could try this case would be in June of this year. And I hope that with the good cooperation that you will give the People of the State, Mr. Schlusberg, and the Court, that all the preliminaries that are necessary will be disposed of by the first part of June, so that we don't go into the summer if we have to try this case. Now, if there is anything else that you feel that the Court should know, why you advise me and I will be glad to hear it.

Mr. Reinhart: We would like to consult with Mr. Schlusberg as to a date that would be satisfactory to him, and then submit that to you and see if that meets with your approval. The first motion has got to be on the records from the Rome State School.

The Court: I will grant that motion, you don't have to have any doubt about that. If this man has (10) that kind of a history, he should have every advantage to have his counsel read it, and understand it for his own protection. That is what the law is in this state. To protect all people.

Mr. Rheinhart: Now, he was committed up there by the Children's Court, which is now the Family Court of Fulton

Minutes of Arraignment in Supreme Court, Fulton County, April 15, 1965.

County, and of course we would like the records in the Fulton County Family Court also, if we may have them, sir.

The Court: I will order any records for you. Just make your papers out and submit them.

Mr. Schlusberg: I am not going to voice any objection to these two motions, that is, the one about the records or the one seeking the psychiatric examination at any time. When counsel wants the motion returnable, I'll be available.

The Court: I didn't hear you say anything about the third one.

Mr. Reinhart: I assume he's consenting to that, as to the alleged statements made orally, or in writing. We would like to have a copy of that statement that was made to you by the defendant.

Mr. Schlusberg: Well, as to that, I (11) think, perhaps, a motion ought to be, perhaps, made by the attorneys, so that I can see the moving papers.

The Court: All right.

Mr. Schlusberg: But as to the psychiatric examination and the others, I have no objection.

The Court: All right. Prepare your papers. I'll remand you to the Sheriff!

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965.

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

TIMOTHY GORDON MORGAN,

Defendant.

STENOGRAPHIC MINUTES of proceedings had in the above entitled actions before HON. HAROLD R. SODEN, Justice, on Tuesday, June 8, 1965, at a Special Term of Supreme Court held in and for the County of Fulton, at the Courthouse in Johnstown, New York.

APPEARANCES:

H. ANDREW SCHLUSBERG, Esq., District Attorney, THOMAS PERSICO, Esq., Asst. District Attorney.

FOR THE PEOPLE OF THE STATE OF NEW YORK

FLOYD J. REINHART, Esq., ROBERT P. BEST, Esq., Attorneys and Counselors at Law.

APPEARING FOR THE DEFENDANT

(The defendant is also personally present in the courtroom.)

(2) The Court: Have the record show that the defendant is in court personally, and that he is represented by his attorneys, and that the District Attorney and the Assistant District Attorney are present. I understand, gentlemen, there is a change in the situation.

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965.

Mr. Reinhart: There is, your Honor. I am one of the attorneys for the defendant Timothy Gordon Morgan, and on behalf of the defendant, whom I am authorized to speak for, we now offer to plead guilty to Murder in the 2nd Degree, in full satisfaction of the indictment which charges Murder in the First Degree, found by the Grand Jury of Fulton County against this defendant, Timothy Gordon Morgan.

The Court: Mr. District Attorney?

Mr. Schlusberg: Your Honor, since the Grand Jury of this county returned an indictment against this defendant, charging him with the crime of Murder in the First Degree, the Legislature of the State of New York has passed a bill, already signed by the Governor, abolishing the death penalty in this state, except in two specific instances. This case does not fall within either of those two exceptions, so that even in the event of a conviction of Murder in the First Degree after a trial, a prison sentence would be the only punishment which this Court could mete out to this defendant.

(3) Mr. Persico and I have given great thought to the request of the defendant that he be permitted to plead to the crime of Murder in the Second Degree. The doctors at the Utica State Hospital, following a lengthy psychiatric examination of this defendant, have found him fully competent to stand trial, capable of understanding the charge against him, and of assisting in his defense. I am mindful of the fact that there were no eyewitnesses to the actual crime. And from the many motions made on behalf of this defendant, it is apparent that a lengthy trial would ensue if a plea of guilty were not accepted. This would entail and incur a great amount of expense to the county of Fulton, and no one can foretell what the verdict of a jury would be after a trial.

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965.

Since it is the desire of the District Attorney's office that society be protected from this defendant and that there be no repetition of this act by him, it is earnestly submitted to this Court that the welfare of the public and the ends of Justice will have been fully met by the acceptance of a plea and resultant conviction of the defendant of the crime of Murder in the Second Degree.

For these reasons, I respectfully recommend the acceptance of the defendant's request that he be permitted to plead guilty to the crime of Murder in the Second Degree. (4) And, your Honor, in compliance with the provisions of the Code of Criminal Procedure, I am filing this statement, setting forth the reasons on the part of the District Attorney's office for its consent to the reduction of the charge from Murder First to Murder Second.

The Court: And I assume, Mr. District Attorney, that you recommend this to the Court?

Mr. Schlusberg: I do.

The Court: And that you go along with it?

Mr. Schlusberg: Yes, I do.

The Court: Would you have the defendant approach the bench.

(The defendant, together with both of his attorneys, appeared before the Bench.)

The Court: You are Timothy Gordon Morgan?

The Defendant: Yes, sir.

The Court: I know you have been in court with your attorneys when these statements have been made by your counsel, Floyd Reinhart, and you have heard, I assume, the District Attorney's statement?

The Defendant: Yes.

The Court: Is that correct?

The Defendant: Yes.

(5) The Court: You have to speak up so this man can

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965.

take it down. I realize that, unfortunately, you have a low intelligence quotient, and I want to make sure, as a Court, that you understand the charge and what is happening here, and that You understand it, not your attorneys. Do you understand that you are formally charged, at the moment, by the Grand Jury of Fulton County, for the Crime of Murder in the first Degree, upon conviction of which you could be incarcerated for the rest of your life? Do you understand that?

The Defendant: Yes, sir.

The Court: Do you understand that you are accused of killing one, Ada Francisco in this county, is that true? Do you understand that?

The Defendant: Yes, sir.

The Court: Do you understand that what has occurred here in this courtroom in the last few minutes is a statement by your counsel, whom you requested to represent you, is that true?

The Defendant: Yes, sir.

The Court: And that you plead guilty to a lesser charge, that is, Murder in the Second Degree, and that that be in full satisfaction of the indictment (6) charging you with Murder in the First Degree, do you understand that? Do you understand that if you plead to Murder Second, then the charge of Murder First is not, thereafter, against you. It is not made against you. It would be in satisfaction of that or in place of that. Do you understand that?

The Defendant: Yes.

The Court: Do you understand, also, that, as I advised you of your rights when you were arraigned, that a plea of guilty to any crime is the same thing as having been tried by a jury and, after a trial, convicted by a jury. Do you understand that?

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965.

The Defendant: Yes, sir.

The Court: It is just as though you had people in that box, and they had heard all the evidence, and then they had come out with the statement of guilty against you for Murder Second Degree. Do you understand that?

The Defendant: Yes, sir.

The Court: Now, with that understanding, and having heard your attorneys, and having heard the District Attorney, what do you plead to, personally?

The Defendant: Guilty.

The Court: Guilty to what?

The Defendant: Second Degree.

(7) The Court: Second Degree what?

The Defendant: Murder.

The Court: And that is your plea?

The Defendant: Yes sir.

The Court: And this you do voluntarily and upon the advice of your counsel, is that true?

The Defendant: Yes sir.

The Court: Do you understand fully what you are doing?

The Defendant: Yes sir.

The Court: Do you understand, also, that if I accept that plea, that I must sentence you from this Bench to prison? Do you understand that?

The Defendant: Yes sir.

The Court: Under the law, we must have a probation officer's report, which I must read and study before I sentence this defendant. I understand that the probation officer of Fulton County is in the courtroom, is that true?

Probation Officer: (Mr. Burton Lesser) Yes sir.

The Court: I assume it will take you some time to make that report, sir.

(8) Probation Officer: Yes sir.

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965.

The Court: Would June 15, 1965 at 9:30 o'clock in the morning be a sufficient time within which you could make that report in writing to this Court?

Probation Officer: It would, sir.

The Court: Do you feel you could do that?

Probation Officer: Yes, I do.

The Court: Is it agreeable to the defense counsel and also to the District Attorney's office that the sentencing be set for Timothy Gordon Morgan in this courtroom at 9:30 a.m. June 15, 1965.

Mr. Reinhart: That's satisfactory, your Honor.

Mr. Schlusberg: Yes, your Honor.

Mr. Best: I will not be able to be present on that date.

The Court: Well, it's only the matter of the sentence now, Mr. Best.

Mr. Reinhart: I assume on this plea you are adjudicating him guilty of Murder in the Second Degree.

The Court: I'm going to accept the plea in a moment.

Mr. Schlusberg: That is satisfactory to (9) me, your Honor.

The Court: I'm sorry, Mr. Best, that you can't be here, but I don't see the essential nature of you being here at that time as long as Mr. Reinhart is.

Mr. Reinhart: I will be here, sir.

The Court: On that understanding and the statements I have made in the presence of the defendant and the presence of his counsel, I will accept the plea of guilty by the defendant personally to Murder Second Degree in full satisfaction of any and all crimes that could be charged against him in this indictment charging him of Murder First Degree submitted by the Grand Jury of Fulton County on April 13, 1965. And I will adjourn this matter until the time and hour set on June 15th.

Minutes of Plea in Supreme Court, Fulton County, June 8, 1965.

Mr. Reinhart: Let the record show the mother of the defendant and his two brothers are in the courtroom at this time here, sir.

The Court: That's all right. And I will remand you to the custody of the Sheriff.

Mr. Reinhart: Do you want his statement now, Judge?

The Court: No, I think the statement should be made at the time of sentencing.

(10) Mr. Reinhart: All right, sir.

The Court: Because there could be some change between then and now, and I think it is better to have it at that time. We'll take the history at that time and the probation report, and I will make the sentence at that time.

Mr. Reinhart: June 15th at 9:30 a.m.

The Court: Yes. And I think this should be filed with the minutes.

Mr. Schlusberg: Yes, your Honor.

Minutes of Sentencing in Supreme Court, Fulton County, June 15, 1968.

SUPREME COURT
STATE OF NEW YORK
FULTON COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

—against—

TIMOTHY GORDON MORGAN

Defendant

STENOGRAPHIC MINUTES of proceedings had in the above entitled action before HON HAROLD R. SODEN, JUSTICE on Tuesday, June 15, 1965, at a Trial Term of Supreme Court held in and for the County of Fulton, at the Courthouse in Johnstown, New York.

APPEARANCES:

H. ANDREW SCHLUSBERG, Esq., District Attorney.

THOMAS M. PERSICO, Esq., Ass't. District Attorney.

FOR THE PEOPLE OF THE STATE OF NEW YORK

FLOYD J. REINHART, Esq.
Attorney and Counsel at Law
Kresge Building
Amsterdam, New York

APPEARING FOR THE DEFENDANT

(The defendant was personally present in court.)

Minutes of Sentencing in Supreme Court,
Fulton County, June 15, 1968.

(2) Mr. Schlusberg: Your Honor, the People are ready to proceed in the case of the People against Timothy Gordon Morgan!

Mr. Reinhart: The defendant is ready!

Mr. Schlusberg: Your Honor, on the 8th day of June 1965, this defendant appeared in person and with his attorneys, Floyd Reinhart and Robert Best, at which time he pled guilty to the crime of Murder in the Second Degree in full expiation of the indictment. At that time, you adjudicated him guilty and adjourned the matter to this time and place for sentence.

The Court: May the record show that the prisoner is here in person, and is represented by Mr. Reinhart. Is there anything you would like to say at this time, Mr. Reinhart?

Mr. Reinhart: Yes, I would like to make a statement to the Court upon my activities in this case, what my investigation showed, and our interrogation of the defendant and what that revealed, and also our interrogation of the various witnesses who were involved in this situation.

It's been a most difficult assignment, sir. This boy comes from a nice family with several other children; none of them have ever been in any trouble, and all of them are (3) energetic and hardworking. He has a nice mother who is concerned with him, of course. But it all goes back to his school days. Apparently he had trouble in school, and I'm satisfied that the extent of his education is his ability to write his name. He's unable to read or write. He makes a nice appearance and is well formed and athletic looking young man. But apparently somewhere along the line he developed an ungovernable temper which got him into trouble, and the trouble started with his principal in Mayfield High School. At that time he was in the 7th Grade. He had been promoted along, I

Minutes of Sentencing in Supreme Court,
Fulton County, June 15, 1968.

assume, because of his size, and to do away with any embarrassment of being with smaller children, although he certainly was not qualified to be in that grade.

He finally was committed up to the Rome State School and classified there as retarded. Now, they took various tests in that school, which we obtained through a court order to show what his mentality was, and it was classified at different levels by the psychiatrists and psychologists who examined him. Some of them had it as low as 40 and others had it as high as 75, but even 75 would be regarded in soceity as very low, so that his intelligence quotient was nothing as to what it should have been.

Now, there is a history of belligerency (4) in the Rome School, with various arguments, disputes and fistfights and quarrels. Finally, about two years ago, he was released to go to work on a farm. It was felt that he could be of some value to society by working on a farm. Well, he arrived at the farm and he worked there for a while, but trouble occurred then between his employer and himself, and which resulted in many fistfights. And then he went to work for Mrs. Ada Francisco who was a neighbor and who liked the young man, apparently, and felt she could develop something with him.

Sometimes as we go through life, we meet and become impatient with people who have infantile minds that don't grasp the situation as readily as we do. And that is true of all of us. We try to explain something which is apparent to us, and if it doesn't seem to get through to our listener, we seem to run out of patience and take a different attitude entirely, once that is almost hostile.

Now, he worked there on the farm and his wages, of course, were very low, but he was conservative, and Mrs. Francisco kept his money for him. He gave it to her, and she had it on this night in question of April 6, 1965.

Minutes of Sentencing in Supreme Court,
Fulton County, June 15, 1968.

He became interested in a young lady in the village of Tribes Hill some few miles away, and he would go down there to see her on his bicycle. His behavior was excellent. No doubt about that. (5) Apparently they got along very well with each other. The family had seemed to regard him well, there. But of course, under the rules of the Rome State School, he was supposed to be back in at ten o'clock at night.

Well, with a young man, you know that time goes pretty fast, especially if you're with somebody you like, especially a young lady. One or two occasions he arrived home after the hour of ten o'clock. Mrs. Francisco, the evidence shows, on at least one occasion slapped him, which was a mistake. She had no right to do that. That took place a couple of days before this incident of April 6, 1965, and that developed a hostility, and on this day in question, she threatened that she was going to send him back to the Rome State School. Now, that propably wouldn't have carried such a terrific threat with it, except for the fact that now having met this young lady and apparently being enamored of her, he started to dwell upon that, and with the mind and intelligence quotient that he has, he started to ponder over the thing. It had an effect that we, probably, in later life, would look back and smile about, but here we are dealing with someone with an intelligence quotient or the mentality of an eight or nine year old, and so that assumed terrific proportions.

So, brooding over that, and brooding over (6) the fact that he was going to have to be put back up there in the Rome State School, on this 6th day of April 1965, he went down into the room of his employer, Mrs. Ada Francisco, and he took a knife with him, of course, but I'm sure that our investigation shows that at that time, he meant no harm to that lady. She had his money. She had

Minutes of Sentencing in Supreme Court,
Fulton County, June 15, 1968.

his cash which he had earned and which he wanted. He wanted to take it in order to leave, so as to escape going back to the Rome State School. The investigator was due there, as I understand it, the next morning. They come once a month from that school to check upon the activities of those who have been assigned out.

He awakened Mrs. Francisco for the purpose of obtaining the money which was rightfully his, and which he had a right to. Of course it was an unusual hour to do it, but he had returned home late, and he had been threatened with that other thing on the part of Mrs. Francisco of returning him to the Rome School. So I assume, putting all of these factors together, the one idea in his mind was to take his money and get away as far as he could to avoid being transferred back.

Now, Mrs. Francisco was awakened. Apparently he had stayed there in the house, and she had no fear of him because her bedroom was open. There was no door (7) on it. No locks at all. So when he awakened her, instead of responding to him, she merely started to scream. Now, I assume if she had talked to him that night in a normal tone, this thing would never have happened. But the minute she screamed, of course with his uncontrollable and ungovernable temper, and the idea in mind of perhaps she may awaken the people who were living in the other apartment of the house—there was a man and his wife who were working there for Mrs. Francisco and living in the house—in order to stop the screaming and in the excitement and tension of it all, the assault occurred and as a result Mrs. Francisco met her death.

Now, I'm not trying to condone the actions that my client took on that night, and because of this, this lady's blood is on his hands, and society demands that he answer for it. And under the circumstances as we have them

now, society demands an opportunity to see if they can punish this young man for what he has done, but also to reform him, if possible, so that perhaps sometime in the future, he may become a valuable adjunct to society.

Now, briefly, there was a flight, of course, afterwards. The amount of money involved was very small. In fact, it was trivial. But that, briefly, are the circumstances surrounding this, and I'm sure that your Honor (8) must feel that on that night, when he entered Mrs. Francisco's bedroom, it was only for the purpose of obtaining the money that was his, and not for the purpose of provoking or engaging in an assault upon that lady.

It's a sad circumstance that it happened and we know that Mrs. Francisco died as a result of it. There was a subsequent flight and arrest in Elizabethtown, and we are in court now in the prisoner's dock to answer for the crime that was committed that night. He's only a young man, sir, and he was just 19 in May of this year, so that his whole life is ahead of him, and it's not a very pleasant thing to stand here representing somebody of that age, knowing full well that a great many years are going to pass before he is able to enjoy his freedom, to enjoy fresh air, to go to a moving picture, to attend a ballgame, and to come and go when he wants to. And there is not much pleasure in it for a defense counsel, realizing the circumstances and realizing that he must pay for what occurred that night.

But I do hope that the Court, in its wisdom and experience, will take into consideration the young man's age, his intelligence quotient, his background, and the circumstances when you pass sentence upon him, and I trust that you will have mercy upon him to the extent that you feel the ends (9) of justice will be met. Thank you.

The Court: We'll take the record now. Now, I realize this defendant has a low I.Q. and I want to make sure that, if possible, that he understands all the questions and the history, and therefore, I'm asking your help, Mr. Reinhart, in helping the Clerk make out that history chart. And also I want, if he can't read it, after it's completed and before he signs it, I want to make sure that you, as his counsel, in front of the Clerk, read those questions and the answers to him so he can comprehend them before he signs it.

Mr. Reinhart: Very well, sir.

THEODORE GORDON MORGAN, the defendant herein, upon being duly sworn by the Clerk, testified as follows:

By the Court Clerk:

Q. Your name, please. A. Tim Morgan. Timothy Gordon Morgan.

Q. And the indictment?

Mr. Reinhart: Murder in the First Degree.

Q. And the plea is—

Mr. Reinhart: The plea is Murder Second.

Q. Your age. A. Nineteen.

Q. Occupation?

(10) Mr. Reinhart: Laborer.

Q. Where were you born? A. Gloversville.

Q. And your residence now? A. Fulton County Jail.

Minutes of Sentencing in Supreme Court,
Fulton County, June 15, 1968.

Q. Citizen or subject of the United States?

Mr. Reinhart: Citizen.

Q. Married or single. A. Single.
Q. Religious instruction. A. Protestant.
Q. And your education? How far did you go in school? A. Seventh grade.
Q. Parents living or dead? A. One is living and one is dead. Mother is living.

Mr. Reinhart: And your father is dead.

A. Yes.
Q. Your habits of life—temperate or intemperate?

Mr. Reinhart: Temperate. You don't drink, do you?

A. No.
Q. Ever before convicted of a crime? A. No.
(11) Q. Counsel assigned?

Mr. Reinhart: Yes, Floyd J. Reinhart and Robert Best.

Q. Do you waive any delay in the time for pronouncing judgment?

Mr. Reinhart: Yes.

A. Yes.
Q. Have you any legal cause to show why judgment should not be pronounced against you? A. No.

Minutes of Sentencing in Supreme Court,
Fulton County, June 15, 1968.

Q. Have you learned or practiced any mechanical trade? A. No.

Mr. Reinhart: No, he's a farmer.

The Court: I'm sure there isn't any mistake on that, Mr. Reinhart, because we have a very competent Clerk, but still, before he signs that, I want you to read that over to him, and make sure that he understands it.

By Mr. Reinhart:

Q. Your name is Timothy Gordon Morgan. A. Right.
Q. And you were indicted on Murder, First Degree. A. Right.
Q. And you entered a plea of guilty to Murder in the Second Degree. A. Yes.
(12) Q. And you are a male. Of the male sex. A. Yes.
Q. Your occupation—you were a laborer. A. Yes.
Q. You were born in Gloversville, New York. A. Yes.
Q. And you're a citizen of the United States because you were born here? Right? A. Right.
Q. And you now live at the Fulton County Jail. A. Right.
Q. You're single. A. (nods yes).
Q. Your religious instruction is that of a Protestant. A. Yes.
Q. And you went as far as the 7th Grade in your education. A. Yes.
Q. Of your parents, your mother is living and your father is dead. A. Right.
Q. Your habits of life are temperate. A. Yes.
Q. You have never been convicted of a crime before, sir.
(13) A. No.
Q. Your lawyers were Floyd Reinhart and Robert Best A. Yes.

Q. You waive delay in pronouncing judgment, sir. A. Yes.

Q. You haven't any legal cause to show why judgment should not be pronounced against you. A. No.

Q. You never learned or practiced any mechanical trade, did you, sir. A. No.

Mr. Reinhart: All right.

(The defendant signed the examination.)

(The defendant, together with his attorney, again appeared before the Court.)

Mr. Schlusberg: Your Honor, I am not going to spend a lot of time reciting some of the facts in this matter, because this defendant stands before you adjudicated and convicted of Murder in the Second Degree. I do want to say that I do not concur with many of the facts presented by counsel, and from the investigation and reports and psychiatric examinations submitted to your Honor, this man knew what he was doing on the day that he committed this crime. He knows what (14) he is doing today, and is fully aware and capable of understanding it.

I think that the crime he committed was a vicious one. Your Honor has a full and complete record and report, and I feel that such a sentence should be meted out to this defendant that will amply and sufficiently punish him for what he did in taking the life of Ada Francisco, and that he be confined so that there will be no repetition by him and that your Honor impose such sentence as will be a deterrent to others. These things must stop. Your Honor, I respectfully move for sentence.

The Court: Have the record show that the Court has heretofore had the opportunity of studying the very voluminous record of the Rome State School in regard to Timothy Gordon Morgan, and the ample report of the Family Court of Fulton County, and the Probation Officer's

report, which is at hand. I also have heard the history of the examination of the defendant under oath, and I heard the questions asked and the answers given, and I am of the opinion that Timothy Gordon Morgan understood the questions and gave and understood the answers, thereto. This is not a pleasant duty and it never has been for me, but it is one of the duties that must be a part of the position that I hold.

(15) At your request, Mr. Morgan, I appointed you two attorneys, Floyd Reinhart and Mr. Best, both of whom I considered to be perhaps the best qualified and best informed lawyers in this type of work in this area. I know they have given unstintingly of their time and effort to do the very best for you in your defense. Likewise, I am impressed by the work of the District Attorney and the Assistant District Attorney since this case began, and the many conferences I have had with both your attorneys and with the district attorney and the assistant district attorney. I feel that all of the authorities involved have given freely of their time and effort to present all the possible facts, psychological, social and legal data, and everything about your history from the time you were born. So I feel that I know you quite well.

I also want the record to show, of course, that I have at hand and have read the report of the psychiatrists at the Utica State Hospital, who, after three weeks of examination of the defendant, came to the conclusion, in writing filed with the Court, that the defendant is sane and understands the nature of an oath or the charge against him, and is able to make his defense.

I believe, Mr. Morgan, that on more than one occasion, this Court has advised you of your right to a (16) trial, and informed you that a plea of guilty on your part to any crime was tantamount or the same as being tried by

a jury and convicted at their hands. This is not an easy case to evaluate on the part of the People as well as on the part of the defense. I know it has given defendant's counsel considerable trouble, and I have given it considerable thought. I realize that, through no fault of yours, and certainly through no fault of anyone else living or dead, you happen to be a person in our society of 1965 who has a very low intelligence quotient. That is, your basic ability to understand is below average, considerably below average. You have been classified as a moron mentally, and I have taken that into consideration and weighed that in regard to your offense and your actions. Because of that, and because of your emotional instability, I have concluded that you should not have the sentence that I originally felt you deserved, a much higher one than I am going to give you today.

I know that your road in life, in prison, is going to be very difficult because of your mentality and your instability. It's going to be a very difficult time for you. On the other hand, you have taken a life, contrary to all law, both legal and moral, and for that you must be punished.

(17) Upon your personal plea, Timothy Gordon Morgan, of guilty to the crime of Murder in the Second Degree in connection with the indictment returned by the Grand Jury of Fulton County at the April 1965 Term of Supreme Court charging you with the crime of Murder First Degree arising out of the unlawful death of one, Ada Francisco, the Court hereby adjudges you to be guilty of Murder in the Second Degree. And it is the judgment and sentence of this Court that you be confined in an institution, under the jurisdiction of the New York State Department of Correction, for an indeterminate term, the minimum of which shall not be less than 25 years, and the maximum of which shall be the remainder of your natural life. And it is the further direc-

tion of this Court that you be committed to the Elmira Reception Center and be dealt with according to the appropriate provisions of the law, in accordance with Article 3-a of the Correction Law of the State of New York.

You are now remanded to the Sheriff of Fulton County.

Mr. Reinhart: If it please the Court, there has been so much striving in the field of penology and sociology, and there are bills pending in the Legislature which I assume will be up for passage in the near future, which I want this defendant to have the benefit of in the event of any (18) sentence revision. So I want to, in some way, protect his rights in the event there are any laws passed in the future which would tend to classify him in a different category than what he is in now. I don't know how to appropriately express it except that I would like to have the record show that I am aware of these things that are being done to classify and modify, and so I want the defendant to have the benefit of it.

The Court: Well, I think that is your duty, Mr. Reinhart, and of course it's very nebulous, as you say, at the present moment, and nobody knows exactly what is going to happen. But I would think that if that is done in all cases, it would have to be done in a retroactive way, and that being so, I am sure that they wouldn't make an exception to this case, or any other case. But I think that it's timely and correct that you make a notation on the record to protect whatever rights he has in that regard.

Mr. Reinhart: Thank you, sir.

The Court: Any unfinished matters will be recessed to my Chambers in Lake Placid.

Decision of Supreme Court, Fulton County, dated May 29, 1971, Denying Writ of Error Coram Nobis.

SUPREME COURT

STATE OF NEW YORK

COUNTY OF FULTON

THE PEOPLE OF THE STATE OF NEW YORK

against

TIMOTHY GORDON MORGAN,

Defendant.

On April 13, 1965, Timothy Gordon Morgan, hereinafter referred to as defendant, was indicted by the Grand Jury of Fulton County for the crime of murder in the first degree. Thereafter, Attorney Robert Best of Gloversville, New York, and Attorney Floyd J. Reinhart of Amsterdam, New York, one of the most able and experienced attorneys in upstate New York, were assigned to represent defendant.

On June 8, 1965, at a term of the Fulton County Supreme Court, Justice Harold Soden presiding, defendant entered a plea of guilty to murder in the second degree in full satisfaction of the indictment. On June 15, 1965, pursuant to Article 3A of the Correction Law, Justice Soden sentenced defendant to an indeterminate term of not less than twenty-five years and the maximum of which shall be the remainder of his natural life.

Decision of Supreme Court, Fulton County, dated May 29, 1971, Denying Writ of Error Coram Nobis.

On May 15, 1971, defendant's petition for a Writ of Error Coram Nobis was received. Defendant requests that the court vacate the judgment of the Supreme Court convicting him, on his plea of guilty, of murder in the second degree. Defendant contends that his plea of guilty was involuntary and not entered knowingly and intelligently in that, he asserts, the Court failed to inform defendant specifically of the element of intent required of the crime of murder in the second degree.

After a thorough reading of the record of the proceedings had on both the date of defendant's pleading and his sentencing, it is clear to this Court that Justice Soden was extremely careful and cautious in ascertaining whether defendant was fully aware of the charge against him and his plea thereto, as well as the consequences of such plea. Justice Soden explicitly told defendant that he wanted to be sure that he, the defendant, knew what was happening, and the Court's questions were aimed at determining just that.

The record further reveals that prior to his plea of guilty on June 8, 1965, defendant had undergone a lengthy psychiatric examination at the Utica State Hospital where it was found and determined that despite defendant's low intelligence quotient he was fully competent to stand trial, capable of understanding the charge against him and of assisting in his own defense thereto.

This court is satisfied that defendant did, in fact, understand the proceedings and the charge to which he was pleading; that he did so voluntarily, and that his rights were fully and adequately protected. Defendant's Coram

Decision of Supreme Court, Fulton County, dated May 29, 1971, Denying Writ of Error Coram Nobis.

Nobis application is, therefore, without merit and is hereby denied.

Submit order accordingly.

Dated: May 29, 1971.

ARTHUR A. AULISI
Justice of the Supreme Court.

To: TIMOTHY GORDON MORGAN, 60284
135 State Street
Auburn, New York 13022

HON. THOMAS M. PERSICO
Fulton County District Attorney
11 Church Street
Gloversville, New York 12078

Opinion and Order of the United States District Court for the Northern District of New York, Granting Petition for Writ of Habeas Corpus, dated October 29, 1974.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

I originally dismissed the above captioned petition by Memorandum-Decision and Order dated September 26, 1973. Upon consideration of a motion made by the relator for a certificate of probable cause, for leave to proceed in forma pauperis and for the assignment of counsel, the United States Court of Appeals for the Second Circuit, by order dated December 12, 1973, granted a certificate of probable cause and reversed my judgment dismissing the petition and remanded the case "to conduct an evidentiary hearing on the issues raised by petitioner, including whether, he was aware that intent was an essential element of the crime and was advised of the scope of the punishment that might be imposed." The mandate of the Court of Appeals was filed in the office of the Clerk of this court on December 27, 1973. Thereafter, counsel was assigned to relator, an evidentiary hearing held on May 3, 1974 at Auburn, New York, and the matter briefed by the parties hereto. The case is now submitted for decision.

The relator alleges that he plead guilty in the Fulton County Supreme Court on June 8, 1965, to Murder 2nd degree and was sentenced on June 15, 1965, to a term of 25 years to life; no appeal was taken. Relator petitioned for a writ of error coram nobis in the Fulton County Supreme Court on the ground that the trial court, at the plea

taking, failed to ascertain whether or not there was a factual basis for the plea; specifically, relator alleged that the court made no attempt to ascertain whether or not the essential element of "a design to effect the death of the person killed" was present. Relator also alleged that the plea was not made with an understanding of the nature of the charges or the consequences of the plea, due, in part, to his I.Q. which is alleged to be between 68-75. The state writ was denied without a hearing on June 3, 1971; the Appellate Division affirmed without opinion. *People* v. *Morgan,* 38 A.D.2d 1012 (3rd Dept. 1972). Leave to appeal to the Court of Appeals was denied on July 6, 1972. Thereafter, the relator commenced the instant proceeding in this court which was originally dismissed by me and reversed and remanded by the Court of Appeals as aforesaid.

THE HEARING

The hearing was held on May 3, 1974 at Auburn, New York; the petitioner introduced the sentencing and arraignment minutes, and also testified on his own behalf. Petitioner testified that he plead to Murder 2nd degree with the knowledge that he was originally charged with Murder 1st degree; he further testified that he understood that if he had plead guilty as charged he could have received a sentence of life imprisonment. He testified that at no time did anyone explain to him the elements of either first or second degree Murder, and that he would not have plead guilty to second degree Murder if he had known or had been informed that an essential element of that offense was an intent to cause the death or a design to effect the death of the victim, as he had no such intent. He further

claimed that he would not have plead guilty to Murder 2nd degree if he had known or had been informed that he could have received the sentence that was imposed upon him; he testified that he had expected a lesser sentence than that imposed.

The principle witness for the respondent was petitioner's assigned co-counsel, Floyd J. Reinhart, Esq.[1] Mr. Reinhart testified that he had engaged in plea bargaining with the District Attorney and had hoped to obtain for petitioner the privilege of pleading guilty to Manslaughter; however, the District Attorney refused to reduce the charge to that extent and insisted upon a plea to Murder 2nd degree. Mr. Reinhart candidly stated that he had never discussed the elements of either first or second degree Murder with the petitioner, and that in his discussions with the petitioner he distinguished the two crimes merely by the type of punishment that could be imposed upon a conviction for the same. Attorney Reinhart, did testify that during the period of plea bargaining and prior to the entry of the plea of guilty, he did inform the petitioner that if he plead to Murder 2nd degree he would receive (and which petitioner ultimately received) a sentence of 25 years to life imprisonment; this information was conveyed to the petitioner at various conferences which were also attended by members of petitioner's family.

Robert P. Best, Esq., petitioner's other assigned co-counsel, also testified at the hearing; his testimony corroborated the testimony of Mr. Reinhart and, in addition, he testified that he *thought,* but could not be certain, that he informed petitioner, in the form of a hypothetical case,

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[1] Who is an experienced, highly-qualified lawyer in criminal and trial practice.

of the differences between Murder 1st degree, Murder 2nd degree, and Manslaughter. However, upon examining and searching his file he was unable to find any notes substantiating such a conversation with the petitioner.

THE LAW

Boykin v. *Alabama,* 395 U.S. 238 (1969), is not applicable to the instant case. See, e.g., *United States ex rel. Rogers* v. *Adams,* 455 F.2d 1372 (2d Cir. 1970). The standard to be applied to the plea of guilty herein is whether under all the circumstances the petitioner made a reasoned choice, voluntarily, after proper advice, and with a full understanding of the consequences. See *United States ex rel. Codarre* v. *Gilligan,* 363 F.2d 961, 964 (2d Cir. 1966).

DISCUSSION

There are two contentions made by petitioner herein:

(1) That he was never told or advised by counsel or the court of the maximum punishment to which he was subjecting himself by pleading guilty to Murder 2nd degree, and that if he had been told or had known that he would be sentenced to 25 years to life he would not have plead guilty; and

(2) That he was never informed of the elements of the crime to which he plead guilty; specifically, he was not aware that an intent to cause death or a design to effect death had to be present and proved in order to convict him of Murder 2nd degree, and that if he had been so informed, he would not have plead guilty.

In connection with petitioner's first claim, I find that the petitioner knew and had been advised that upon his plea

to Murder 2nd degree he would be sentenced to a term of 25 years to life; this was, in fact, the sentence imposed upon petitioner after his plea. In this connection, I credit the testimony of petitioner's two co-counsel on the hearing herein and discredit the petitioner's testimony in this regard. Based upon this finding, I cannot agree that the petitioner's plea was entered in ignorance of its direct consequences insofar as the maximum sentence was concerned; therefore, petitioner's due process rights were not violated in this regard. Cf. *United States ex rel. Leeson* v. *Damon,* 496 F.2d 718 (2d Cir. 1974). Accordingly, petitioner's first claim is without foundation.

In connection with petitioner's second claim however, I find that he was not advised by court or counsel prior to his plea of the elements required to be established for any degree of homicide nor was he aware of the same; particularly, I find that petitioner was not advised by counsel or court, at any time, that an intent to cause the death or a design to effect the death of the victim was an essential element of Murder 2nd degree. As stated by the Supreme Court, "a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy* v. *United States,* 394 U.S. 459, 466 (1969). Based upon the foregoing, I hold as a matter of law that petitioner's plea of guilty was not intelligently or knowingly entered and was, therefore, involuntary. Accordingly, petitioner's plea of guilty to Murder 2nd degree must be set aside as involuntary and unconstitutional.

The foregoing opinion constitutes the court's finding of fact and conclusions of law in accordance with F.R. Civ. P., Rule 52(a).

Opinion and Order of the United States District Court for the Northern District of New York, Granting Petition for Writ of Habeas Corpus, dated October 29, 1974.

For the reasons herein, it is

ORDERED, that the conviction challenged herein be and the same hereby is set aside, and it is further

ORDERED, that the respondent Superintendent discharge the petitioner Timothy G. Morgan from custody, unless the State of New York takes such steps as are necessary to return the petitioner to Fulton County for rearraignment; said rearraignment is to be held within 60 days of the date hereof, and it is further

ORDERED, that in the event a timely notice of appeal is filed, execution of the judgment herein be and the same hereby is stayed pending said appeal.

EDMUND PORT
United States District Judge

Dated: October 29, 1974.
Auburn, New York.

Notice of Appeal, dated November 6, 1974.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that the Superintendent of Auburn Correctional Facility, Auburn, New York, hereby appeals to the United States District Court of Appeals for the Second Circuit from the order made October 29, 1974 and filed in the office of the Clerk of this court. The order sustained the writ of habeas corpus and set aside the conviction challenged by the petitioner.

The petitioner is confined at Auburn Correctional Facility, Auburn, New York.

Dated: November 6, 1974

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By s/ JOSEPH R. CASTELLANI
JOSEPH R. CASTELLANI
Assistant Attorney General

Order-Decision of the United States Court of Appeals for the Second Circuit, dated May 12, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of May one thousand nine hundred and seventy-five.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. WILFRED FEINBERG
Circuit Judge

HON. WILLIAM J. JAMESON
District Judge

[SAME TITLE]

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

Order of the United States Court of Appeals for the Second Circuit Recalling and Staying Mandate Pending Petition for a Writ of Certiorari, dated May 29, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the respondent-appellant by notice of motion dated May 20, 1975 to recall the mandate and stay its reissuance for 30 days pending petition for a writ of certiorari to the Supreme Court of the United States pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

IRVING R. KAUFMAN, Chief Judge.

WILFRED FEINBERG, Circuit Judge.

WILLIAM J. JAMESON, District Judge.